No. 356

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

SHEBA BRACELETS, INC., and
ROBERT J. CARROLL,

Defendants-Appellants.

APPENDIX TO APPELLANTS' BRIEF

On Appeal From the United States District Court
for the Southern District of New York

Palmer, Masia & Palmer,
Attorneys for Defendants-Appellants,
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Supreme Printing Co., Inc., 114 Worth Street, N. Y. 13. BEekman 3-2320

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United States Court of Appeals

For the Second Circuit

CRIMINAL DOCKET—CRIM. NO. C139/165

—o—

THE UNITED STATES

vs.

SHEBA BRACELETS, INC.	all counts
ROBERT J. CARROLL	" "
SAMUEL DIAMANT	count 1 only
LOUIS FISHER	" " "
EMIL POPPER	" " "

—o—

Docket Entries

(Record pp. A-C)

Date	*Proceedings*
8-25-52	Filed Indictment
8-25-52	Bench warrants ordered for Robert J. Carroll, Samuel Diamant, Louis Fisher and Emil Popper EDELSTEIN, J.
8-26-52	Bail of $10,000. fixed for Louis Fisher. Commr. Platt.
8-27-52	Filed notice of appearance by Irving Spieler, 475—5th Av. NYC as atty for Louis Fisher.
8-27-52	Filed notice of appearance by Moses Polakoff, 475—5th Av. NYC as atty for Samuel Diamant.
8-27-52	Filed notice of appearance by Julian V. Carabba 55 & 13th Av. Bklyn NY. for deft. Emil Popper.

Docket Entries

Date	*Proceedings*
9-17-52	Sheba Bracelets Inc pleads not guilty by Robt J. Carroll Treas.
	Robert J. Carroll pleads not guilty—Bail $15,000. to be renewed by 4 PM today
	Samuel Diamont pleads not guilty—Bail $15,000. to be renewed by 4 PM today
	Louis Fisher Pleads Not Guilty—Bail continued.
	Emil Popper pleads not guilty—Bail of $10,000. to be renewed by 4 PM today Ryan J.
9-17-52	Filed recognizance for Samuel Diamont—$15,000. Continental Cas. Co., surety.
9-17-52	Filed recognizance for Emil Popper—$10,000. Continental Cas. Co., surety.
9-17-52	Filed recognizance for Robt. J. Carroll—$15,000. Continental Cas. Co., surety.
10-10-52	Filed Transcript of record of proceedings, dated 9-17-52
3- 3-53	Filed recognizance dated 8-26-52 for Louis Fisher for $10,000. Continental Cas. Co.
4- 1-53	Filed affdt. consents and order permitting deft. Emil Popper to leave jurisdiction of this court. Noonan, J.
7- 3-53	Filed complaint for Emil Popper, Robert J. Carroll and S. Diamant dated 9-28-51, bail bond for Samuel Diamant dated 9-29-51 for $15000. Continental Casualty Co., surety, bail bond for Robert J. Carroll dated 9-29-51 for $15000. Continental Casualty Co., surety and bail bond for Emil Popper dated 9-29-51 for $10000. Continental Casualty Co., surety.

Docket Entries

Date	*Proceedings*
6- 4-56	Filed affdt. by Archibald Palmer, Atty for adjournment of trial.
6- 4-56	Indictment severed as to Samual Diamont on motion of Government and consent of defendant's Attorney, trial of remaining defendants referred to Levet, J. McGohey, J.
6- 4-56	Filed affdt. and order to employ Dr. William M. Hitzig to examine Samuel Diamant. Ryan, J.
6-14-56	Filed notice of appearance by Archibald Palmer, 320 Bway NYC as atty for Sheba Bracelets and Robert J. Carroll.
6-26-56	Filed Transcript of record of proceedings dated 6-11-56.
9-11-56	Trial begun before Judge Palmieri and Jury as to Sheba Bracelets, Inc. and Robert J. Carroll on Counts 1-2-3-10 & 11, and as to Louis Fisher on Ct. 1. Jury empanelled and sworn. Deft. Carroll moves to strike counts 2 or 3 Denied. Deft. Carroll moves to strike cts 10 or 11—Denied. Deft. Carroll moves to dismiss count 1—Denied. Deft. Carroll moves to dismiss indictment. Denied—Palmieri, J.
9-12-56	Trial con't.
9-13-56	Trial con't.
9-14-56	Trial con't. Gov't moves to dismiss indictment as to Deft. Fisher—Granted. Palmieri, J.
9-21-56	Trial con't. Court rules to dismiss conspiracy against Defts. Sheba Bracelets Inc. and Robert J. Carroll. Palmieri, J.
	Motions as to illegal arrest, search & seizure,—suppression and duplicity—denied. Palmieri, J.

Docket Entries

Date	*Proceedings*
9-24-56	Trial continued and concluded. Motion by deft. for withdrawal of juror—denied. PALMIERI, J. Jury returns verdict—Both defendants Sheba Bracelets Inc. and Robert J. Carroll guilty on all four counts (2-3-10 & 11). Pre-sentence report ordered. Sentence set for 10-15-56 at 10:15 AM. Defendant continued on Bail. PALMIERI, J.
9-21-56	Filed Court's exhibits #8, #9 and #12.
10- 3-56	Filed opinion #22955. Motions to suppress, Motions charging duplicity, illegal search & seizure, and insufficiency of evidence are denied. Motion to dismiss the conspiracy count is granted. 9-21-56. PALMIERI, J.
10-23-56	Filed Judgment #61,191 as to deft. Sheba Bracelet, Inc.—Fined $5,000 to cover counts 2-3-10 & 11. Deft. continued on Bail of $15,000, pending appeal. PALMIERI.
10-23-56	Filed Judgment #61,192 as to deft. Robert J. Carroll.—Sentenced to Eighteen (18) months on counts 2-3-10 & 11, to run concurrently with each other at a place of confinement to be designated by the Atty. Genl. of the U. S. Fined $5,000 to cover counts 2-3-10 & 11. (committed) and to stand committed until fine is paid or he is otherwise discharged according to law. Deft. continued on Bail of $15,000, pending appeal. PALMIERI, J.
10-24-56	Filed notice of appeal for defts. Sheba Bracelets, Inc., and Robert J. Carroll dated 10-24-56.

Docket Entries

Date	*Proceedings*
10-26-56	On motion of the Government (Ruskin) Counts 4 to 9 inclusive are dismissed as to defts. Sheba Bracelets Inc. and Robert J. Carroll. PALMIERI, J.
11- 8-56	Filed Transcript of record of proceedings, dated Sept. 11, 12, 13, 14, 21, 24, 1956, Oct. 15, 23 & 26, 1956.

A True Copy

(Illegible) Clerk

By CATHERINE B. SALAMONE
Deputy Clerk

(SEAL)
JAW

Indictment

(Record pp. 1078-1092)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Grand Jury charges:

1. From on or about the 1st day of September, 1949, up to and including the date of the filing of this indictment, in the Southern District of New York, Sheba Bracelets, Inc., Robert J. Carroll, Samuel Diamant, Louis Fisher and Emil Popper, the defendants herein, together with divers other persons whose names are to the Grand Jurors unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States, to wit, to violate Title 12, Section 95(a), United States Code, and Executive Order No. 6260, as amended, and the regulations issued and promulgated thereunder, and to defraud the United States in the exercise of its governmental functions of investigating, regulating or prohibiting the importing, exporting, hoarding, melting or earmarking of gold coin or bullion by any person subject to the jurisdiction of the United States.

2. It was a part of said conspiracy that the defendants Sheba Bracelets, Inc. and Robert J. Carroll, would keep and maintain false and fictitious record.

3. It was further a part of said conspiracy that the defendants Robert J. Carroll, Samuel Diamant and Louis Fisher would obtain large quantities of fine gold.

4. It was further a part of said conspiracy that the defendant Emil Popper would represent that gold acquired by the defendant Sheba Bracelets, Inc., was used in the manufacture of jewelry.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 17th day of September, 1951, the defendant Robert J. Carroll received a quantity of fine gold from Kastenhuber & Lehrfeld, Inc.

2. In further pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 17th day of September, 1951, the defendant Louis Fisher had a conversation with the defendant Robert J. Carroll.

3. In further pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 17th day of September, 1951, the defendant Robert J. Carroll visited the office of the defendant Samuel Diamant at 10 West 47th Street, New York City.

4. In further pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 18th day of September, 1951, the defendant Robert J. Carroll visited the office of the defendant Samuel Diamant at 10 West 47th Street, New York City.

5. In further pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 20th day of September, 1951, the defendant Robert J. Carroll visited the office of the defendant Samuel Diamant at 10 West 47th Street, New York City.

6. In further pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 28th day of September, 1951, the defendant Robert J. Carroll visited the office of the defendant Samuel Diamant at 10 West 47th Street, New York City. (Title 18, Section 371, United States Code.)

SECOND COUNT

The Grand Jury further charges:

1. On or about the 14th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that the industry, profession or art in which the defendants were regularly engaged, requiring the use of said gold referred to in the aforesaid certificate was "manufacturing jewelry"; whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged, requiring the use of such gold was not "manufacturing jewelry." (Title 18, Section 1001, United States Code.)

Indictment

THIRD COUNT

The Grand Jury further charges:

1. On or about the 14th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that certain gold which was sold to Sheba Bracelets, Inc., defendant herein, as a result of a representation made in such certificate, would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged; whereas in truth and in fact, as the defendant Robert J. Carroll then and there well knew, the said gold so acquired was not to be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged. (Title 18, Section 1001, United States Code.)

FOURTH COUNT

The Grand Jury further charges:

1. On or about the 17th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make

a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that the indusfry, profession or art in which the defendants were regularly engaged, requiring the use of said gold referred to in the aforesaid certificate was "manufacturing jewelry"; whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged, requiring the use of such gold was not "manufacturing jewelry." (Title 18, Section 1001, United States Code.)

FIFTH COUNT

The Grand Jury further charges:

1. On or about the 17th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that certain gold which was sold to Sheba Bracelets, Inc., defendant herein, as a result of a representation made in such certificate, would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged; whereas in truth and in fact, as the defendant Robert J. Carroll then and there well knew, the said gold so acquired was not to be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged. (Title 18, Section 1001, United States Code.)

Indictment

SIXTH COUNT

The Grand Jury further charges:

1. On or about the 18th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that the industry, profession or art in which the defendants were regularly engaged, requiring the use of said gold referred to in the aforesaid certificate was "manufacturing jewelry"; whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged, requiring the use of such gold was not "manufacturing jewelry." (Title 18, Section 1001, United States Code.)

SEVENTH COUNT

The Grand Jury further charges:

1. On or about the 18th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in

an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that certain gold which was sold to Sheba Bracelets, Inc., defendant herein, as a result of a representation made in such certificate, would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged; whereas in truth and in fact, as the defendant Robert J. Carroll then and there well knew, the said gold so acquired was not to be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged. (Title 18, Section 1001, United States Code.)

EIGHTH COUNT

The Grand Jury further charges:

1. On or about the 20th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that the industry, profession or art in which the defendants were regularly engaged, requiring the use of said gold referred to in the aforesaid certificate was "manufacturing jewelry"; whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged, requiring the use of such gold was not "manufacturing jewelry". (Title 18, Section 1001, United States Code.)

Indictment

NINTH COUNT

The Grand Jury further charges:

1. On or about the 20th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that certain gold which was sold to Sheba Bracelets, Inc., defendant herein, as a result of a representation made in such certificate, would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged; whereas in truth and in fact, as the defendant Robert J. Carroll then and there well knew, the said gold so acquired was not to be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged. (Title 18, Section 1001, United States Code.)

TENTH COUNT

The Grand Jury further charges:

1. On or about the 28th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold",

said statement and representation being to the effect that the industry, profession or art in which the defendants were regularly engaged, requiring the use of said gold referred to in the aforesaid certificate was "manufacturing jewelry"; whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged, requiring the use of such gold was not "manufacturing jewelry". (Title 18, Section 1001, United States Code.)

ELEVENTH COUNT

The Grand Jury further charges:

1. On or about the 28th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the Treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an "End-Use Certificate for Semiprocessed Gold", said statement and representation being to the effect that certain gold which was sold to Sheba Bracelets, Inc., defendant herein, as a result of a representation made in such certificate, would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged; whereas in truth and in fact, as the defendant Robert J. Carroll then and there well knew, the said gold so acquired was not to be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged. (Title 18, Section 1001, United States Code.)

....

Foreman

MYLES J. LANE,
United States Attorney.

Excerpts From Testimony

* * *

[60] Q. Mr. Crotty, I show you Government's Exhibit 1 and ask you if you know what that is? A. Yes, sir.

Q. Would you tell us what that is? A. It is a copy of an application for a Treasury Department gold license.

Mr. Palmer: Pardon me. Will you get over there? His voice naturally follows you, and if you are over here we can hear him.

So, with your Honor's permission, may we have the last question and answer read? I couldn't hear it over here.

The Court: Yes.

(Record read.)

[61] Q. And by whom was that application filed? A. The application was filed by Sheba Bracelets, Inc.

Q. With the Treasury Department? A. Yes, sir.

Q. What does that application concern, what does it ask?

Mr. Palmer: I object. It speaks for itself, your Honor.

The Court: Well, to save time, I take it the best proof of that appears on its face. Can you answer the question by reading from the document itself?

A. Well, it is a request for a license to hold gold.

The Court: Well, I don't think there is any dispute about that, is there, Mr. Palmer?

Mr. Palmer: No. That is the reason why I thought the paper speaks for itself.

The Court: I will allow the answer to stand.

Mr. Palmer: All right.

Q. Mr. Crotty, is that an application for any particular type of gold license? A. Yes, it is, Mr. Ruskin. It is an application—

Q. Would you tell us what type of gold license that [62] is an application for? A. It is an application for a license that would permit the successful applicant to manufacture, sell and trade in gold jewelry and allied items in gold and other precious metals, as it states here.

Q. When was that application filed with the Treasury Department? A. Let's see now. I don't recall the exact date of the application.

Mr. Palmer: I can't hear the gentleman.

Mr. Ruskin: Speak up, Mr. Crotty.

The Court: "I do not recall the exact date of the application."

The Witness: I do not recall the exact date of the application.

The Court: Does it appear from the paper itself? If you know the application date, I suggest you point it out to the witness so as to help him, and we will get through it more quickly.

Mr. Ruskin: Yes, sir.

Well, it is actually on here, but almost illegible, your Honor, so the witness can actually not testify.

Mr. Palmer: Now, Mr. Ruskin's voice is usually [63] good but I can't hear him.

Mr. Ruskin: I am sorry, Mr. Palmer. I said it is on here but almost illegible, so the witness can't testify.

Mr. Palmer: As your Honor said, you can give the date. I have no objection.

The Court: He said it is illegible. He will try to ascertain the date some other way.

Mr. Ruskin: February, 1949.

Mr. Palmer: All right, put it down.

The Court: Then it is agreed it is 1949?

Mr. Palmer: All right.

Q. Will you tell us what type of license this is an application for?

Mr. Palmer: Didn't he say "TGL 14" in response to your question?

Mr. Ruskin: Do you have an objection, Mr. Palmer?

Mr. Palmer: No.

Q. Go ahead. Speak up. A. This is an application for a type license which is known as TGL 14 license.

Q. And what type of license is that? What does that permit? [64] A. That is a license that permits the person acquiring the gold the manufacture and hold up to a certain amount of gold, which is stipulated in the license.

Q. To use that gold in the manufacture of jewelry? A. For the manufacture of jewelry; that is correct.

Q. I show you Government's Exhibit 2 and ask you if that is the license which was issued to Sheba Bracelets as a result of the application which is Government's Exhibit 1? A. Yes, it is; yes, sir.

Q. Can you tell us when that license was issued? A. This license was issued on March 18, 1949.

Mr. Palmer: I beg your Honor's pardon. Could it appear upon the record, if it is a fact, that that is a copy of the license that was issued?

The Court: You may cross examine. This paper is in evidence.

John Crotty—for Government—Direct

Mr. Palmer: I want it in evidence, but I mean—

The Court: You are not making any objection. You are making a comment on the evidence, Mr. Palmer.

[65] Mr. Palmer: I subside.

Mr. Ruskin: May I read the license to the jury, your Honor?

The Court: Yes.

(Read to jury.)

Mr. Ruskin: Then it goes on to specify different types of license.

(Mr. Ruskin continues to read the exhibit to the jury.)

Mr. Ruskin: Then it is signed by the acting superintendent of the Assay Office; and then at the bottom of the license it says:

"Section 4 of the Gold Reserve Act of 1934 provides as follows"—

(Mr. Ruskin continues to read the exhibit to the jury.)

Mr. Ruskin: Then it goes on to define fabricated gold.

By Mr. Ruskin:

Q. Now, subsequent to the expiration date of that license, were these temporary licenses, represented by Government's Exhibit 3 through 8 issued to Sheba Bracelets, and do those exhibits constitute photostatic copies of the temporary licenses which were issued? [66] A. Yes, sir.

Q. And what periods do those licenses cover? A. They cover the period—

Q. What month? A. From April 1, 1951 to August 29, 1951. These are in reverse order, actually.

John Crotty—for Government—Cross

Q. Now, Government's Exhibit 3 is a license for the month of September. That extends through September 30, 1951; is that correct? A. That is correct; that's right.

Q. And Government's Exhibit 4 is a license for the month of June, 1951; is that correct? A. Month of August.

Q. No, 4 A. June, yes.

Q. And Government's Exhibit 5 is a license for the month of August, 1951. A. Yes.

Q. And Government's Exhibit 6 is a license for the month of July, 1951; is that correct? A. Yes, sir.

Q. Government's Exhibit 7 is a license for May, 1951, and Government's Exhibit 8 is a license for the month of April, 1951. [67] A. That is correct.

Q. So they constitute temporary licenses which were issued for the period April 1, 1951 to September, 1951, all of those exhibits. A. That is correct.

* * *

[72] *Cross-examination by Mr. Palmer:*

Q. Do you know the Sheba Bracelets Company at all? A. Well, I know of the—do I know of the name? Yes, sir.

[73] Q. You know of the name; do you know where the place of business was? Were you ever there? A. No, sir.

Q. Do you know what business they were in? A. As indicated on their application.

Q. What was that? A. Jewelry manufacturing.

Q. Now, in connection with that statement, in connection with the pleadings here, I ask you whether or not the exhibit that you spoke about before, the license, was it a copy or was it an original, the one that you saw when Mr. Ruskin turned it over to you? Was that a copy or an original? A. It is an authenticated photostat of the original.

John Crotty —for Government—Cross

Q. Of the original. Now, I call your attention to this particular paper and I ask you whether this is the original, to your knowledge, of that particular authenticated copy? A. Yes, sir.

Mr. Palmer: I offer the original in evidence. When I say "offer the original in evidence," I am referring to the fact—

Mr. Ruskin: Could I see it, Mr. Palmer, and [74] there may be no objection?

No objection.

(Marked Defendant's Exhibit A.)

Mr. Palmer: As part of Exhibit A, I am reading, with your permission, to the jury:

(Defendant's Exhibit A read to jury.)

Q. And then it is signed, "Acting Superintendent"—what is his name? A. George Tobin.

Q. That is the name you mentioned? A. Yes.

Q. Now, in connection with this particular license or any license issued through your office, does the Government have assistants who investigated or regulated the exporting, hoarding, melting or earmarking of gold coin or bullion by any person? Do they have people who investigated that?

Mr. Ruskin: Your Honor, I will object unless we are confined to the facts in this case.

The Court: I will allow him to answer yes or no, and then you may renew your objection to subsequent questions.

You may answer that yes or no.

A. Yes, sir.

John Crotty—for Government—Cross

[75] Q. In other words, before a license was issued by the Government to anyone to do the things that are allowed by the license, the Government had people who investigated the applicant for that license; correct? A. An investigation was made, yes, sir.

Q. And during the period of time when they renewed that application for license, that application could be continued to be made by the same organization; correct? A. I don't understand your question.

Q. I say, during the period of time when the application would be renewed, because you remember you have got some renewals here, the same functions would take place, investigation; correct?

Mr. Ruskin: Your Honor, I object, because this witness—

The Court: No, I think the only fair question would be whether the Government had facilities to conduct investigations either for original applications or during their renewal.

That is what you are trying to bring out?

Mr. Palmer: May I embrace your question and adopt it as my own?

The Court: What is the answer to that?

[76] A. The Government does have facilities, yes.

The Court: And for the renewals as well as original applications?

The Witness: Yes.

Q. Will you kindly tell me, where are those people located who made investigation on behalf of the Government for renewals or original applications? A. Some of the investigators were located in New York. Some of them are located in New York.

Q. And about how many in all, if you know, investigators were there in that particular department or departments? A. I can't answer that. I don't know.

Q. Were there many? A. There were several, quite a few, more than I knew?

Q. More than you knew? A. Yes, sir.

Q. In connection with the last exhibit that was offered to you, it speaks about a quarterly report.

Mr. Palmer: May I have that, please?

The Court: You are showing the witness which exhibit now?

Mr. Palmer: Exhibit 10.

[77] Q. Have you got that? A. Yes, sir.

Q. Well, now the people who got the license or the renewal of the license, so far as they are concerned, they had to furnish, according to the rules and regulations, a quarterly report as to what business they did: correct? A. Yes, sir.

Q. And those quarterly reports were also subject to investigation? A. I don't know anything about the quarterly reports. They were returnable to the office in Washington. They were not returnable to our office.

Q. But they were made quarterly; you know that? A. That is my understanding, yes, sir.

Q. That means then, as I understand it, that in so far as the person was concerned who wanted to go in the jewelry business or fabricating jewelry, as Mr. Ruskin put it, in the year '48, '49, '50 and '51, anybody who complied with the regulation, who were investigated, would have the right to ask for a license; correct?

Mr. Ruskin: Your Honor, could we break that down into two or three questions?

Mr. Palmer: It is not so difficult.

[78] Mr. Ruskin: No; I would like, in all fairness to the witness, to have it broken down.

Mr. Palmer: Who says the witness says I am unfair?

The Court: Nobody said it, Mr. Palmer. It was merely a suggestion to reframe the question.

Mr. Palmer: All right.

Q. In other words, as far as they are concerned, the person who got a license would have to be in the jewelry business in order to comply with the section which, when read in the original license, says, "In any form for fabrication or use by you in the industry, profession or art in which you are engaged"; correct? A. Yes, sir.

Q. In other words, if anyone was in the jewelry business or wanted to go in the pewelry business and wanted to use gold to fabricate, he would have to ask the Government, who would investigate him, for permission to buy the gold; is that correct?

Mr. Ruskin: Your Honor, this witness has not testified to that.

The Court: I sustain the objection on the ground the question is confusing.

Mr. Palmer: All right.

[79] The Court: You should reframe it, Mr. Palmer, and break it down so as to refer to two categories, the person in the jewelry business and the person who proposed to go into the jewelry business, and you may put the question that way, if you wish.

Q. Did you hear what his Honor said?

The Court: I didn't—

A. I did.

The Court: I didn't put a question.

Mr. Palmer: I just wanted to know if he heard what you said.

Q. Anyone who proposed to go in the jewelry business, who wasn't in the jewelry business, in order to obtain permission, would have to file the forms required, right? A. File an application, yes, sir.

Q. Then the Government had its investigative forces on hand to see whether or not they were following through with what they said in their application? A. I can't answer that question.

Q. All right, then don't. Then so far as, in connection with the application for renewals, the same formalities would be gone through. You applied for it; the Government could investigate it with investigative [80] forces, and then would issue a license or not.

Mr. Ruskin: Your Honor, I will object to the form of the question again.

The Court: Well, I think it is already answered. The answer is yes. It has already been answered. Mr. Palmer.

Mr. Palmer: All right.

The Court: The answer would be "Yes," wouldn't it?

The Witness: Yes.

Mr. Ruskin: Your Honor, my only objection is to asking this witness with respect to anything concerning investigations.

The Court: But there is no dispute that the Government had investigative facilities, that these facilities were available.

Mr. Ruskin: If they wished to investigate.

The Court: Mr. Palmer, would you be good enough to go to another relevant point now? You have covered that point.

Q. Do you know the firm of Kastenhuber & Lehrfeld, refiners, at West 46th Street in New York? A. Yes, sir.

Q. Will you kindly tell us, because I am in the [81] dark regarding that, the people who got a license, like the Sheba, to buy gold for fabrication, where would they go to get the gold, if you know?

Mr. Ruskin: I will object to that.

The Court: Yes, sustained.

Q. Did they go to a refiner or did they go to the mint? A. They could go to either.

Q. Either. Now, you say you know the firm of Kastenhuber & Lehrfeld as being refiners; correct? A. Yes, sir.

Q. When they went to Kastenhuber & Lehrfeld or any other refiner, would there be any requirement on the part of the refiner to obtain from the person buying the gold for what purpose they wanted the gold?

Mr. Ruskin: I object, your Honor.

The Court: Yes, I sustain the objection on the ground the question is improper in form, and I don't think that it is understandable. How can you obtain a purpose?

Q. The person who receives the license to go ahead, as in this instance, the Sheba, in any form, to use 150 ounces, troy ounces, or fine gold for fabrication or use in the industry, profession or art in [82] which he was engaged, where would he go to get the gold?

Mr. Ruskin: I object, your Honor. That wouldn't be within this witness's knowledge.

Q. If you know?

The Court: That has already been answered, because the witness has said that the buyer could go to a refiner or to a mint.

Isn't that what you have already testified to?

The Witness: Yes, sir.

Q. And one of the sellers would be the firm I just mentioned; correct? A. Yes, sir.

Q. Now did they have to receive any kind of a paper or document from the person buying the gold, as to what he was going to use the gold for?

Mr. Ruskin: I object, your Honor.

The Court: Yes, sustained. I think the proper question would be whether there was an outstanding regulation requiring such a refiner-seller to obtain a license or other authorization from the prospective buyer.

Isn't that what you are trying to find out?

In a transaction in which the refiner sold [83] the gold to a prospective purchaser, did your regulations require the refiner-seller to obtain any written authorization or other paper from the buyer?

The Witness: Yes, your Honor.

The Court: The answer is yes.

Q. What would he have to receive? A. There is a requirement that the seller secure an end use certificate from the purchaser.

Q. What about the time when the end use certificate was not being used, at the time when the license was being used? What then? A. I don't understand you.

Q. Before the end use certificate came into effect, all you would use was the license; is that correct? A. That is correct.

Q. Now, what did you have to do with the refiner in connection with getting the gold from the refiner, in connection with any papers you gave him, what did he have to get? A. I don't know what the refiner would have to get.

Q. But when the end use certificate was in effect, you would have to get the end use certificate; correct? A. Yes, sir.

Q. And the end use certificate came from the [84] Government; is that correct? A. That is correct.

* * *

[87] Q. Now, will you kindly tell me, did that particular certificate give the right to the Sheba, according to its terms, to buy 150 ounces, troy ounces, of bullion, gold? [88] A. This certificate permitted Sheba to acquire and have in their possession up to the equivalent of 150 troy ounces of gold.

Q. At any one time. What date is that? A. This is dated April 1, 1951.

Q. You said a moment ago, and if I am in error, please correct me, that you saw no end use certificates after April, 1950, the date when end use certificates came into effect: is that right? A. I am afraid I am going to have to correct you on that. I made no such statement.

Q. Well, did Sheba receive end use certificates after April, 1950, to purchase the gold from the refiners or any other source for fabrication? Did they? A. Did they receive it?

Q. Yes. A. I don't know.

Q. Well, as far as you are concerned, what is the paper you now hold in your hand? A. This is an authenticated copy of a Treasury Department gold license.

Q. Is that a license or an end use certificate? A. This is a Treasury Department gold license.

Q. Well, when did end use certificates come into [89] effect, as distinguished from licenses? When? A. There is no distinction between—

Q. Go on, no distinction between what? A. —end—between end use certificates and licenses.

Q. Well, then, when did the term "end use certificates" come into existence, so far as you know, instead of the word "license"? When did that come into existence? A. It never did.

* * *

[266] Q. Will you tell us where the place was that you arrested Mr. Carroll, with respect to the office of S. Diamant. A. Well, it would be directly under his window.

Mr. Palmer: Under Mr. Diamant's window?

The Witness: Yes, sir.

Q. On the street? A. Yes, sir.

Q. Where did you take Mr. Carroll after placing him under arrest? A. I took Mr. Carroll across the street to a ticket office of a railroad company, and on the way over I had asked him, "Mr. Carroll, what did you do with the gold?"

Mr. Spieler: I object to any conversation between this witness and Carroll not in the presence of the defendant Fisher.

The Court: Your objection is noted and I will allow it with respect to Carroll, and it may or [267] may not be admissible, depending upon later connecting evidence. But I will sustain the objection in so far as Fisher is concerned.

You may testify.

A. I asked Mr. Carroll, "What did you do with the gold?"

He said, "I can't tell you. It involves too many people."

Then we sat down in this office across the street for a period of about twenty-five minutes.

Q. Then what happened? A. At that time one of our other agents—

Q. What was his name? A. Agent Sweeney arrived with Agents Weiss and Johnson, with a search warrant for the office of S. Diamant. I left Mr. Carroll with Agent Weiss and I went up into the office of Mr. Diamant with Agent Sweeney and we walked in there.

* * *

[297] Q. You say you got a search warrant for the premises over on Coney Island Avenue; is that correct? A. Yes, sir.

Q. Well, you were suspicious of that place, according to you, with the dust we talked about, on July 25th; is that correct? A. Yes, sir.

Q. And you watched the activities—call it that—of Mr. Carroll from September 6th, on these numerous days—we won't have to go into them again—day by day, with the New York Times newspaper each time; correct? A. Yes, sir.

Q. Would you kindly tell me when was the first time you ever asked for a search warrant for Mr. Diamant's place? When? What date? A. I don't recall, sir.

Q. You swore to the application for a search warrant, didn't you? You made the affidavit? A. I don't recall the date, sir.

* * *

[300] Q. All right. Now, you also testified that a search warrant was obtained for the examination of the premises over in Coney Island Avenue; is that correct? A. Yes, sir.

Q. Now, I ask you, did you make an affidavit for that? A. Someone in our service did.

Q. I am asking you did you? A. Well—

Q. Would you say you didn't? A. It may have been Agent Sweeney; it might have been Mr. Whitaker.

Q. And it might have been you? A. Yes, sir.

Mr. Palmer: I call upon the District Attorney at this point, your Honor, to let me see the search warrants for the searching of the premises of Mr. Diamant, and also for the premises of the Sheba over in [301] Coney Island Avenue upon the days that this gentleman said that they were executed. I would like to se those.

The Court: You want them for the purpose of establishing the date?

Mr. Palmer: Yes, your Honor.

The Court: All right, will you let me see them, please?

Mr. Ruskin: Yes, sir; I will see whether I have them with me, your Honor. They are either here or in the office.

The Court: Or if you have other evidence of the day, will you state what the date is? We will accept that for the time being subject to your producing the papers later, so as not to delay the proceedings.

Mr. Ruskin: Yes, sir.

September 28, 1951, a search warrant was obtained for searching the premises at 10 West 47th Street, your Honor.

The Court: And what was the other search warrant?

Mr. Ruskin: Just one moment, sir.

Your Honor, I don't believe that a search [302] warrant was obtained for the search of the premises at 2747 Coney Island Avenue. The search warrant was obtained on September 28th for the search of the premises at 10 West 47th Street.

Robert Joseph Newbrand—for Government—Cross

The Court: All right.

Mr. Palmer: In other words, unless to the contrary, Mr. Ruskin said there was no such warrant obtained for searching the premises on September 28th in Coney Island Avenue, and unless something else to the contrary shows up, I can take it for granted there was no search warrant.

The Court: Yes, you can assume that to be a fact unles there is something to the contrary.

* * *

[306] Q. Now, you say you arrested him on the 28th? A. Yes, sir.

Q. Did you have a warrant for his arrest? A. Yes, sir.

Q. When did you apply for that warrant or make an affidavit for it, when? A. I don't recall the date, sir.

Mr. Palmer: Will you let me have the date, please, and the warrant, and the affidavit upon which the warrant was granted?

Mr. Ruskin: Once again, I believe it is down in the office, your Honor, but I can get it.

The Court: Will you provide the date at this [307] time, and if you can produce the other papers later, we wil look at them later.

Mr. Ruskin: September 28, 1951, arrest warrants were issued for—

Mr. Palmer: Issued for whom?

Mr. Ruskin: Robert J. Carroll.

* * *

[320] Q. There was a search warrant—there was no search warrant, Mr. Ruskin says, for the premises in Coney Island Avenue; right?

Mr. Ruskin: Your Honor, I object to confronting this witness with a statement I made in court.

The Court: Yes, you can assume that to be the fact, in view of the fact that Mr. Ruskin represented that to be.

Q. Well, did you and your agents search the premises? [321] A. Yes.

Q. Was there anybody there in the premises when you searched the premises in Coney Island Avenue? A. Yes, there were.

Q. Were there any books and records there? A. Yes, I believe there were.

Q. Did you take the books with you? A. I didn't, no.

Q. Who did?

Mr. Ruskin: Your Honor—

Q. You said, "I didn't." I am asking you who did?

Mr. Ruskin: I object.

The Court: The question is, do you know whether anyone else did then? You can ask him that.

Q. Do you know if anybody else did take any books? A. I don't recall, sir.

Q. Were you there from the time the search began until the search ended? A. No, sir.

Q. Did you see books and records in the Sheba place of business at the time you were there on the 28th?

Mr. Ruskin: 25th.

[322] Mr. Palmer: Excuse me. The 25th.

A. On July 25th?

Q. No, I am talking about September 28th.

Mr. Ruskin: I am sorry. I thought he meant the prior date.

Mr. Palmer: Why should I? However, I am sure you meant it in good stead.

Q. You were there on September 28th. You weren't there on the 29th; am I right? A. That is right, sir.

Q. I am talking about September 28th. Were there any books and records there in the Sheba place?

Mr. Ruskin: Your Honor, I think the witness just answered that very question.

Mr. Palmer: You were talking about July 25th.

Mr. Ruskin: No, he answered that before. He said July 25th. That is why I thought you meant another day.

The Court: Better reframe the question. I am afraid we have lost it.

Q. When you were in the place on September 28th, before you left, did you see any books and records there of the Sheba? [323] A. Yes, I believe I did.

Q. Afterwards did you see those books and records in 90 Church Street or anywheres else, or in the District Attorney's office? A. Yes, I saw them in the United States Attorney's office.

Q. When? A. In June.

Q. In June? A. 1956.

Q. Did you see them before that time? A. No, I don't believe so.

Mr. Palmer: Now, if your Honor please, I demand at this time, in view of the fact the statement has been made before the Court there was no warrant for the seizure of any of the records or any of the things contained in the premises on Coney Island, or any search warrant, that all books and records obtained by this seizure, which I claim was unwar-

ranted in law, because there was no search warrant for it, that they be returned to us.

The Court: Well, there is no evidence here that anything was seized. This witness has said—

Mr. Palmer: He said he saw them in the District Attorney's office.

[324] The Court: He said he saw them there. Then he said at a subsequent time he saw them at the United States Attorney's office. You have no right to say that there is any evidence before me that they were improperly or illegally seized. I will be glad to discuss that with you out of the presence of the jury when I question Mr. Ruskin.

I suggest you withhhold any further comment on the subject until after it has been discussed privately.

Mr. Palmer: All right. Then, if your Honor please, I will ask that a statement be made upon the the record by the District Attorney as to whether he had any warrant of any kind to seize any books and records of the Sheba Bracelet Company any time before we came to court today.

The Court: I decline to make any such request, and I adhere to the instructions which I just gave you.

Mr. Palmer: I take an exception.

The Court: Now, please don't go into this thing any further with this witness and with me in the presence of the jury.

Mr. Palmer: All right.

* * *

Harold Bloom—for Government—Direct

[334] HAROLD BLOOM, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination by Mr. Ruskin:

Q. Mr. Bloom, what is your occupation? A. Accountant.

Q. Accountant? A. That's right.

Q. How long have you been an accountant? A. About fifteen years.

Mr. Palmer: How many years?

The Witness: Fifteen.

Mr. Palmer: Thank you.

Q. Now, are you acquainted with a man by the name of Robert Carroll? A. I am.

Q. Do you see Mr. Carroll in the courtroom? A. I do.

Mr. Palmer: (To the defendant) Stand.

Q. Is that the gentleman? A. Yes.

Mr. Ruskin: Would the record indicate that [335] the witness has identified the defendant Robert Carroll?

The Court: Yes.

Q. At one time did you serve as accountant for Mr. Carroll? A. I did.

Q. Was that around the year 1951? A. I believe it was.

Q. As accountant for Mr. Carroll, were you and are you familiar with the books and records of a corporation by the name of Sheba Bracelets, Inc? A. I am.

Q. Were you the accountant for that corporation? A. Only for a period.

Q. Around that time? A. Yes.

Mr. Palmer: When was that time, Mr. Ruskin?

Mr. Ruskin: Around 1951.

Will you mark these, please?

(Marked Government's Exhibits 17, 18 and 19, for identification.)

Q. Mr. Bloom, I show you Government's Exhibit 17 for identification and ask you if you know what they are? A. Those are sales invoices.

[336] Q. Of whom? A. Sheba Bracelets.

Q. Mr. Bloom, I show you Government's Exhibit 18 for identification and ask you if you know what that book is? A. That is the cash book, cash receipts.

Mr. Palmer: I can't hear you, Mr. Bloom.

The Witness: Cash receipts book.

Q. Of whom? A. That is of Sheba.

Q. Now, I show you Government's Exhibit 19 for identification and ask you if you know what that book is? A. That is a cash disbursements of Sheba.

Q. Were Government's Exhibits 17, 18 and 19 records kept by Sheba Bracelets in the regular course of its business? A. Yes.

Q. And was it the regular course of its business to keep such records? A. Yes.

Mr. Ruskin: I offer them in evidence, your Honor.

Mr. Palmer: Pardon me, if your Honor please. In view of the fact that I raised the question before,

[337] which is sort of in the air, if your Honor will clear the air for me, I know what I am going to do or what I should do. I claim that these books were seized without a warrant, without a search warrant and without any order of a court authorizing their seizure. For the present moment the question of whether they can go into evidence doesn't depend on whether they were books kept in the course of Sheba's business. The question would be whether or not the Government would have a right to introduce them by reason of what I contend makes them non-usable, and under the circumstances, I want to reserve in connection with any decision your Honor makes at the present time such right to claim that all records that are being introduced in evidence and any matter pertained thereto may be stricken if you determine later on, if this is not the right time.

The Court: You may reserve the right to make any objection that is well founded. There is no evidence before me now of any illegal seizure, and I therefore wish you to refrain from making any such reference, and I instruct the jury to disregard it.

But at the proper time, if there should be basis for sustaining such an objection, of course I [338] will entertain it and I will take proper action at that time. There is nothing before me.

Mr. Palmer: The only reason I bring it up for you, in my mind—

The Court: I am not asking you for any reason, Mr. Palmer. I am giving you the right to reserve.

Mr. Palmer: I think this is out of turn.

The Court: You need not state the reason. You have the right to reserve your objection.

Mr. Palmer: Now, may I look at these books for a minute?

Harold Bloom—for Government—Direct

Mr. Ruskin: They are on your desk.

The Court: They have been offered in evidence as books of account; is that right?

Mr. Ruskin: That is correct, your Honor.

The Court: And the objection has been reserved by Mr. Palmer.

Have you any other objections, Mr. Palmer, to these books?

Mr. Palmer: Your Honor, in view of what you say regarding the books, and bearing that in mind, I can make no other objection to the books, but I certainly object at the proper moment to the introduction of something that isn't a book, upon the ground that no foundation [339] has been laid, and that so far as they are concerned, the witness has not in any wise testified to any matter concerning these particular papers. Those are not books.

The Court: They need not be books. If they are business records, they can be introduced on the same basis. There is no special virtue in a book binding.

Mr. Palmer: It all depends upon whether he wrote them.

The Court: Oh, no. If he knows that they were kept in the regular course of business of Sheba Bracelets and that it was the regular course of Sheba Bracelets to keep these papers, which are now marked 17 for identification, that is sufficient.

Mr. Palmer: I am trying to follow through. May I have those for a moment then? I want to see a date.

The Court: Do you have any further objection?

Mr. Spieler: Your Honor, I have—

The Court: Just a minute, Mr. Spieler. I want want to make this statement. 17, 18 and 19 may be marked in evidence and Mr. Palmer has reserved his rights to object on the grounds of alleged seizure.

Harold Bloom—for Government—Cross

[340] Mr. Spieler: I object on the ground that those entries are in no way binding upon my client, and I object to their introduction on the ground that they in no way relate to him.

The Court: Your objection is sustained. They do not relate to him and are not to be considered in evidence against him, not connected by proper proof.

(Government's Exhibits 17, 18 and 19 for identification received in evidence.)

Mr. Ruskin: Your witness, Mr. Palmer.

Cross-examination by Mr. Palmer:

Q. Were there any other books and records, other than these two that were produced by the District Attorney, that were kept during the course of your regime there? A. There should be one other book, a general ledger.

Q. And the books that were shown to you, is not one of them a general ledger? A. No.

Mr. Palmer: Where is the general ledger?

I ask, if your Honor please—it appears in all these businesses everything is posted in a general ledger, and in view of the fact that your Honor has a [341] ruling in the future to make or not to make, one book is missing.

The Court: Mr. Ruskin, if you have the general ledger, would you be good enough to produce it?

Mr. Ruskin: Yes, sir; I will do that.

Mr. Palmer: I would like to have it now.

Mr. Ruskin: I believe this is it, your Honor.

The Court: Well, ask the witness whether that is the general ledger. If it is, give it to Mr. Palmer.

Harold Bloom—for Government—Cross

By Mr. Ruskin:

Q. Is this the general ledger to which you are referring, Mr. Bloom? A. No, this is the general journal.

Mr. Ruskin: I will have to try again.

Mr. Palmer: What is that?

Mr. Ruskin: It is the general journal. Do you want this?

Mr. Palmer: You should put in all the books.

Mr. Ruskin: Your Honor, I object to Mr. Palmer calling upon me to produce the general ledger. I showed this to the witness and here is the general journal. If you want the general journal, you are entitled to it.

The Court: Just a moment.

Mr. Palmer: I say at present that all the [342] books that they seized—pardon me. I drop the word "all"—the books of this company that they seized should be produced at one time.

The Court: Well, are you satisfied that if the general ledger is there, it will be produced?

Mr. Palmer: Well, I have some reasons. The witness is on the stand and I want to ask him questions.

Mr. Ruskin: Your Honor, I don't think, in fact I am sure, that the Government, at least in the set of books over there, has no book other than the one I showed the witness.

The Court: All right.

Mr. Ruskin: That is the only one that I see.

Mr. Palmer: Wait a minute.

The Court: Would you mind stepping down and going over to those books, please, Mr. Bloom, and see whether you can find it? Then there will be no question about it.

Harold Bloom—for Government—Cross

Mr. Palmer: Mr. Ruskin had these things too long around his office. He is a very busy man.

The Court: Could we withdraw Mr. Bloom while he is doing that, Mr. Ruskin? Would you have any objections asking Mr. Geijer questions while Mr. Bloom is searching for it?

[343] Mr. Ruskin: No objection at all.

In fact, your Honor, I don't believe there was any general ledger, that I have ever seen.

Mr. Palmer: Well, Mr. Bloom said there was a general ledger. He was the accountant there. You brought him on the witness stand.

Mr. Ruskin: Your Honor, do we have to have Mr. Palmer start summing up at this point?

Mr. Palmer: Is there anything wrong with my saying the witness said there was a general ledger?

The Court: Yes, Mr. Palmer, because this isn't the time to.

Mr. Palmer: How can I do any more? The witness says there is a general ledger. He looks in his box for some kind of a paper and there is no general ledger here. They have got the books. What am I supposed to do?

The Court: The witness said that there should be a general ledger. Mr. Ruskin has said that he has no general ledger. I don't see that that is any basis for further argument or controversy or for comment to the jury.

Mr. Palmer: Well, I think that Mr. Ruskin at this time should explain by receipt or otherwise [344] what books he took or where he took them from.

The Court: No, I decline to ask Mr. Ruskin for any explanation.

Mr. Palmer: All right. I always remind you of the fact that I know you are the Judge.

The Court: Have you any further questions of this witness?

Mr. Palmer: I want to ask him questions. I want the general ledger. Maybe it's downstairs.

The Court: Mr. Palmer, we are not going to hold up the trial to find something that isn't available. Mr. Ruskin has searched his books for the paper and can't find it.

Mr. Palmer: Very good.

By Mr. Palmer:

Q. You have been an accountant for fifteen years? A. That's right.

Q. Will you kindly tell me was the set of books kept in this business a double entry set or single entry set? A. It was a double entry set.

Q. And in connection with double entry sets of books as kept by you in the course of your employment by this corporation, did they have a general ledger? [345] A. Yes, sir.

Q. Did the general ledger consist of postings from the sales of slips, the cash disbursement book the cash receipts book and the balance? A. Just from the cash receipts and the cash disbursements.

Q. That would be in the general ledger? A. That's right.

By the Court:

Q. Did you say you kept these books? A. In my home.

Q. No; I mean did you actually do the posting? A. Yes. The books were just strictly a transcript of the checkbook.

Q. So that you actually wrote them up with the posting? A. Only for one year because there was somebody on before I was.

By Mr. Palmer:

Q. Now, in connection with what you are just now saying, look in the books that are here before the Court, marked in evidence—oh, here they are—and tell me whether or not there appears in the ledger—pardon me—in either the cash disbursements or the [346] cash receipt book the account of Robert Buri, 321 Broadway, New York City. Is that the receipts? A. Yes, these are the receipts. Who is Robert Buri?

Q. B-u-r-i, of 321 Broadway. He is named there. A. Well, I have to go through this whole thing to find out.

Q. I am going to give you these names, and see if your memory will help you to do it this way: Robert Buri, of 321 Broadway; Branston & Company, 10 West 47th Street; Cooper Jewelry Company, of 64 Fulton Street; Dubera Corporation, 17 East 42nd Street; American Corporation, 17 East 42nd Street; Pioneer Chain Company, 36 East 23rd Street; Frank Brooks, 712 Poplar Street, Philadelphia; do any of those names appear there? A. They do.

Q. I beg your pardon? A. They do.

Q. They do? A. That's right.

Q. Now, will you please tell me, do they appear as having paid moneys? A. They do.

Q. To this concern? [347] A. They do.

Q. Will you give me some of the dates of Robert Buri? A. January 3rd, 4th, 5th, 6th, 9th and 10th of January, 1950.

Q. How much money, total? A. $33,000.

Q. $33,000. All right. That is only January. A. That's right.

Harold Bloom—for Government—Cross

Q. How about Cooper Jewelry in January? A. $16,500.
Q. That they paid? A. Yes.
Q. How about Dubera Corporation?

The Court: Well, Mr. Palmer, these names—

A. These names are all before I came in here.

The Court: (Continuing) If they appear in the books there, the books are in evidence and you can argue from them later. I see no point in making this witness turn the pages and say they are there.

Mr. Palmer: This is the only thing I can say to your Honor. I can't go wandering through these books in front of the jury in summation.

The Court: Do it during recess.

[348] Mr. Palmer: I would like very much, if your Honor please. It is very simple.

The Court: You have a long list there.

Mr. Palmer: Oh, no, I have got six, seven names, just a few names, to see if they're in the books, set of books.

Q. How about Dubera Corporation? A. Who?

Q. Dubera, D-u-b-e-r-a, Corporation, 17 East 42nd Street? A. There is one on November 7th, '49, for $5,840, and then there is one on November 10th for $5,645.82; the 16th and 17th is $11,245.82; November 25th is $5,600.

Q. How about the Amercom Corporatioin, 17 East 42nd Street? A. November 14th, $5,645.82.

Q. How about the Pioneer Chain Company? A. Look, if you want, if we can get the accounts receivable ledger of Sheba?

Q. Is that up here? A. I believe they had it up here before.

Mr. Ruskin: It is.

The Court: Did you say you made these books [349] up from the—

The Witness: From the checkbook. The receipts were listed on one side and the checks were written out, all the information on them.

The Court: Nothing else, just the checkbook?

The Witness: That is all.

Q. And from the checkbook they were deposited in the book and this would be a reconciliation of the bank account. A. That's right.

Mr. Palmer: Where is that?

Mr. Ruskin: The clerk has it.

Q. This is not the general ledger, this is only the accounts receivable. A. Accounts receivable.

Q. That means when they sold merchandise they posted it in there and what they bought they—

Mr. Ruskin: Your Honor, just a moment. This is what I am afraid of. Mr. Palmer is now implying that this witness has personal knowledge of these transactions. It is merely a reflection of the books of what took place.

The Witness: That's right.

Mr. Palmer: Pardon me. These books, you said, [350] were kept in the regular course of business.

Mr. Ruskin: That's right.

Mr. Palmer: If that is so, and you can prove what you are trying to prove to the jury, that they falsified their own books.

The Court: No, Mr. Palmer, that is not so, and Mr. Ruskin is not offering these books as proof of the truth of everything that is in them. He is offer-

ing them as books which were kept by this company, and that is all. The question of what can be accepted as true or false is a matter for the Court, under proper instruction.

Mr. Palmer: It is up to him to show, though, beyond a reasonable doubt that these books are false, instead of stating that to the jury without any evidence to back it up.

The Court: He made no such statement.

Mr. Palmer: He said it to the jury and read from the overt acts about keeping false books and records.

The Court: That is what he is supposed to prove.

Mr. Palmer: These are the books he has got to prove them from. He can't prove them from something else.

[351] The Court: Mr. Palmer, you have not established a basis for making a statement that any transactions took place. That is an ultimate question of fact. This witness is being asked to read from the books entries which he didn't make, which were made at a time prior to his association with this business as an accountant, and I think it is only proper that that should be brought out.

Mr. Palmer: I don't care what he brings out. It is perfectly all right with me.

By Mr. Palmer:

Q. Will you kindly tell me, look in the ledger and tell me is there an account with Robert Buri, 321 Broadway, in the accounts receivable ledger? A. Yes.

Q. Running from when to when? A. October, '49 to April, 1950.

Q. Is there an account there with Cooper Jewelry Company? A. Yes, sir.

Harold Bloom—for Government—Cross

Q. Running from when to when? A. October, 1949 to April, 1950.

Q. Is there an account there with Dubera Corporation of 17 East 42nd Street, New York City? [352] A. Who?

Q. I spell it "D-u-b-e-r-a," Dubera. A. Yes.

Q. There is. Running from when to when? A. November 7, '49 to November 25, 1949.

Mr. Ruskin: Your Honor, might I suggest that if the witness is going to be asked to read from the book, that is be offered in evidence and the Government will have no objection.

Mr. Palmer: He has offered them in evidence.

Mr. Ruskin: No, no, it has not been offered in evidence.

The Court: May it be deemed to be in evidence and it will be offered as your exhibit. Is that what you wish?

Mr. Ruskin: It makes no difference, but—

The Court: All right, you have you objection to this being in evidence?

Mr. Palmer: No, no, excepting what your Honor said before, as to retaining any objection to all these books.

The Court: Yes.

Mr. Palmer: That is all right.

The Court: It will be deemed marked and given [353] the next number.

(Marked Government's Exhibit 20.)

The Court: All right, No. 20 is the accounts receivable.

The Witness: Yes.

The Court: Go ahead, Mr. Palmer.

Harold Bloom—for Government—Cross

By Mr. Palmer:

Q. Dubera Corporation, beginning when and ending when? A. November 7, 1949 to November 25, 1949.

Q. Amercom Corporation, 17 East 42nd Street?—A. November 14th to November 21, 1949.

Q. Pioneer Chain Company? A. 36 East 23rd Street, December 15, '49 to March 31, 1950.

Q. Branston & Company, 10 West 47th Street, B-r-a-n-st-o-n & Company. A. September 30, '49 to October 6, '49.

Q. How much was the amount of the sales recorded in that book, as they appear recorded in the books for— A. For Branston?

Q. Yes, and payments? A. $32,500.

Q. And payments? [354] A. $32,500.

Q. Cast Chain Company, 36 East 23rd Street? A. January 31, '51 to February 28, 1951.

Q. How much are sales and payments, about how much? A. $194,500.

The Court: All right, Mr. Palmer, I think you have gone far enough now.

Mr. Palmer: Your Honor, if I don't mention the next name there will be something else. I will stop with the next name.

The Court: All right.

Q. Frank Brooks, 912 Poplar Street, Philadelphia.

Mr. Ruskin: 712.

Mr. Palmer: 712.

Q. About how much? A. $400,000.

Mr. Palmer: That is all—

Robert Joseph Newbrand—for Government—Cross

By Mr. Palmer:

Q. Oh, by the way, was there a payroll book kept there, too? A. I believe there was a payroll book.

Q. In that box did you see a payroll book? A. I didn't notice it now.

[355] Q. Was there any book of any kind, which you kept in the place while you were there, for withhholding taxes? A. No, just the one payroll book.

Q. And that caried everything? A. That's right.

* * *

[387] Mr. Palmer: Thank you.

One other thing, I think, is left still in abeyance. I asked yesterday that the search warrant for the premises of Diamant, which was referred to yesterday by date, and the affidavit accompanying that search warrant, and the affidavit for the arrest of Mr. Carroll, and the warrant of arrest, to be produced, and I think at that time your Honor short cut the thing by having Mr. Ruskin give you some dates. I would like to see the original papers through you.

The Court: Have you the papers?

Mr. Ruskin: Yes, I do, sir.

The Court: May I see them?

Do you represent that these are accurate carbon copies of the affidavit of Mr. Sweeney and the order of Commissioner Platt?

Mr. Ruskin: Your Honor, I haven't compared them with the original, which is filed in the office of the Commissioner. If your Honor directs me to do that, I can do that and represent that to your Honor.

The Court: I wish you would make such a comparison and make a representation on the record. For the time being, the date of the affidavit of Mr. Sweeney is September 28, 1951, which appears from this carbon [388] copy, and the date appearing on Commissioner Platt's—

Mr. Ruskin: I don't believe they have been conformed.

The Court: —is September 27th. I don't see how that can be. There is some inconsistency. He is basing his warrant on an affidavit of Sweeney dated the 27th of September, and it so recites, but the affidavit which is given to me appears to be dated September 28th. One of those two dates must have been changed in the original.

Well, I suggest, Mr. Palmer, that we proceed with the trial until the originals can be examined.

Mr. Palmer: Very good.

The Court: Then I will see that a proper statement is made for the record. There is some inconsistency between the 27th date and the 28th. It isn't apparent.

* * *

[389] *Cross-examination (continued) by Mr. Palmer:*

Q. Now, let me ask you this question then: When you were there on September 28th or July 25th, did you see books and records of the Sheba Bracelet Company? Did you see them, as books? A. To the best of my recollection, yes, sir.

Robert Joseph Newbrand—for Government—Cross

Q. Now, yesterday, I don't know whether you were in the room at the time, maybe you weren't, various books and records of the Sheba Bracelet Company were [390] introduced in evidence through Mr. Ruskin, and the books and records, among others, were these; and in order to make the record clear, I want to give you the exhibit numbers, Exhibit 18, Exhibit 20 and Exhibit 19; and I ask you, before you took the witness stand today did you ever see these books or any of them, as books of the Sheba? Just look inside. A. I have seen these books in Mr. Ruskin's office.

Q. There was a previous Assistant District Attorney in charge of this matter, and you mentioned the fact that the District Attorney was the one who prepared the papers and the affidavit; you remember you said that yesterday? A. I believe that to be true.

Q. That was in 1951; is that right? A. Yes, sir.

Q. And his name was Kaplan? A. Yes, sir.

Q. And you saw him at that time? A. Yes.

Q. That was about five years ago; right? A. Yes, sir.

Q. Did you ever see any other Assistant District [391] Attorneys in connection with this matter subsequent to Mr. Kaplan's being on the scene and Mr. Ruskin appearing in this matter? Did you see any other Assistant District Attorney? A. No, sir.

Q. Mr. Kaplan is no longer with the office, you know that? A. Yes, I understand.

Q. It was to Mr. Kaplan that you went to or Mr. Sweeney went to in connection with obtaining the warrant for the arrest and the warrant for search; is that right? A. It was Mr. Sweeney who went to Mr. Kaplan.

* * * *

[404] Q. Now, on September 28th—let's go to that day—when you saw Mr. Carroll on September 28th, did you have the warrant of arrest in your pocket? A. No, sir.

Robert Joseph Newbrand—for Government—Cross

[405] Q. Had the warrant of arrest been applied for, to your knowledge, the day before?

Mr. Ruskin: I object, your Honor.
The Court: Sustained.

Q. To your knowledge?

Mr. Ruskin: Your Honor—
Mr. Palmer: Did you say "Sustained"?
The Court: Yes.
Mr. Palmer: That is enough.

Q. When did you get the warrant of arrest, what time?

The Court: Mr. Palmer, I am going to see that the original papers are produced, and I will give you the precise dates appearing on the file copies which were acted upon, so that you will know the date of the affidavit and the date of the Commissioner's warrant.

Mr. Palmer: I want, your Honor, to know at the present moment when these papers are here, without even seeing them I am going to ask, after your Honor examines them and makes up your mind whether I have a right to look at them or not, to offer them in evidence anyway.

The Court: I will entertain that motion.
Mr. Palmer: Very good.

* * *

[418] Q. Had you made any arrangements with anyone to come up with a warrant prior to the time you arrested Mr. Carroll? A. I knew somebody was coming with a warrant. I didn't make the arrangements.

* * *

[433] A. Yes, sir; I was told to wait until Agent Sweeney arrived.

Q. With what? A. With a warrant, search warrant for Mr. Diamant's, for Mr. Diamant's office.

Mr. Ruskin: That is all.

Recross-examination by Mr. Palmer:

Q. Anyone tell you to arrest this man without a warrant? You said you were under orders; you were under orders to wait; is that right? A. Yes, sir.

Q. You have been following this man day in and day out; correct? A. That is correct, sir.

Q. You knew where he lived? [434] A. Yes, sir.

Q. You started from his home? A. Yes, sir.

Q. Did anybody tell you to arrest this man without a warrant? Did you get any orders to arrest him without a warrant? A. I arrested him, sir.

Q. I didn't ask you that. We spoke about orders. Did you get any orders to arrest him without a warrant? A. I was told to arrest him.

Q. Without a warrant? I said without a warrant? A. Well, I didn't have a warrant.

Q. I didn't ask that question. Did anyone tell you to arrest this man without a warrant? A. Not in those words, no, sir.

* * *

[435] Q. Did you show the search warrant to anyone? A. Yes, sir; Mr. Sweeney did.

Q. And that was to search for what, for gold?

Mr. Ruskin: I object to the form of the ques-
[436] tion.

Q. What was the search warrant for?

Mr. Ruskin: I object.

Q. If you know?

The Court: The search warrant will be produced, and I will show it to you.

Mr. Palmer: Very well, I heard you.

Q. Will you kindly tell me if at any time, from the time you went into that place, up to the time you left the place, if that safe in the premises was opened by the direction of Mr. Sweeney or by the act of Mr. Diamant, the man we are talking about, was it opened? A. I don't recall, but I assume it was.

Q. Anyway, there was no gold found; right? A. That is correct, sir.

* * *

[447] Mr. Ruskin: Your Honor, I also have the original of the affidavit for search warrant which Mr. Palmer requested.

Mr. Palmer: May I look at those in the recess? I don't want to disturb the equilibrium of the court at the present time.

The Court: Yes. I want to be sure I see the date. Yes, the date of Edward Sweeney, the special agent, which was attached to the search warrant, is September 28th, which is the day of the warrant, [448] and therefore the dates are consistent. I questioned the copy I saw this morning which had the prior date, so you may have it.

I want the record to show that I turned over to Mr. Palmer the original affidavit of Mr. Sweeney attached to the search warrant, as well as the official file in my possession containing the affidavit and other papers.

Mr. Palmer: May I look at them during the recess instead of now?

The Court: Yes.

Mr. Palmer: Thank you.

* * *

[455] Q. In 1951, you said there was a dental laboratory there; right? A. In 1951, yes.

Q. And was the dental laboratory there in 1950? A. Yes.

Q. And in 1952? A. Now, 1952, let's see.

Q. Your best recollection. A. I think it was.

Q. Were you ever in that dental laboratory? A. Me?

Q. Yes.

Mr. Ruskin: Your Honor, I think the witness's [456] testimony was that there is a dentist there now. Mr. Palmer has changed that to a dental laboratory, and I would like to object.

Mr. Palmer: Well, on the voir dire, ask him. I am satisfied he said "dental laboratory." You ask him.

Mr. Ruskin: I would like to.

Mr. Palmer: It makes no difference to me. Go ahead. We are here to get the truth between the two of us.

By Mr. Ruskin:

Q. Mr. Magarill, you stated that between 1950 and 1951 there was a dentist living— A. Upstairs.

Q. — at 712 Poplar Street. A. 712 Poplar.

Q. What was his name? A. Herman Berman.

Q. Herman Berman? A. He was living in two rears back. By the way, I am sorry, he wasn't living there; he just had his office up there, where he was doing his work.

Joseph Magavill—for Government—Cross

Q. Now, was it a dental laboratory or the office of a dentist? Just explain what he did there. [457] A. No, he wasn't pulling teeth, you understand. He was just making a new set of teeth.

Q. Now, how many rooms did he occupy? A. He had two rooms in the back.

Q. And he took orders and made teeth for people? A. I think so.

Q. Prosthetics? A. Well, people used to come in and out, come in.

Q. He would fit them for dentures? A. Right.

Q. And prepare the dentures and give them to the people? A. Right.

Q. At the right price? A. Right.

Mr. Ruskin: That is all.

By Mr. Palmer:

Q. Now, in connection with this dental laboratory, were you ever in his place? Did he have a laboratory there where he made these teeth and used gold and things of that kind? Did you see that there? A. Well—

Mr. Ruskin: Your Honor, could we have that broken down to about eight questions?

[458] Mr. Palmer: I will do it with one. Let's not get so picayune. I don't know what he is scared about, the dental laboratory part.

Mr. Ruskin: I am not scared about anything, Mr. Palmer. I want you to put a question to the witness in a fair way.

The Court: Gentlemen, will you please address your remarks to me?

Mr. Palmer: I withdraw the question.

Joseph Magarill—for Government—Cross

The Court: Will you be good enough first to establish the extent of his familiarity with the work being conducted in this laboratory?

Mr. Palmer: The question I asked was, was he ever in there?

The Court: Yes, how often he was in there.

Mr. Palmer: Yes, I am just asking that question.

The Court: Put a short question.

By Mr. Palmer:

Q. Were you ever in that—I want to be careful—were you ever in the dentist's office? A. Well, very seldom that I went in there. The only time that I spoke to that man, we had a bathroom right before his two rooms. Whenever I used to go in, [459] wash myself, taking a shave, I used to see that man.

Q. Did you see that man or any assistant of his, if he had one, working on teeth? A. No.

Q. Do you know whether he had any place in there where teeth were created or prepared? A. Well, I used to see—I used to see on the, like he had a bench, like.

Q. What do you mean by a "bench, like"? A. Oh—

Q Where he worked? A. Where he worked.

Q. Worked on what, on teeth? A. He was that.

Q. He worked on the teeth? A. Yes.

Q. Now, in this place of yours, this is the year 1956, and between 1951 and this year did anyone ever come to see you from the Government, showing credentials or otherwise, and ask you about Mr. Brooks? A. Well, I would say that two gentlemen were in to see me a few years ago.

Q. Do you see any of those gentlemen in the courtroom? [460] A. Even if I would seen them, I wouldn't recognize them.

Q. Do you know whether the gentlemen in question came from Mr. Carroll to find out about Mr. Brooks? Do you know who the gentlemen were? Do you know their names? A. The one coming in?

Q. Do you know their names? A. No.

Q. Did they leave a card with you? A. No, they didn't.

Q. All right. Now, I ask you the question when for the first time did you get a subpoena? A. For the first time when I got a subpoena, that was in June, I think it was.

Q. Of this year? A. Right.

Q. So for the first time you ever got a subpoena, and when you got a subpoena did you see Mr. Ruskin? A. I come out here.

Q. I beg your pardon. I am not talking about today. When you got a subpoena in June, did you see Mr. Ruskin, the gentleman sitting here? [461] A. Not in here.

Q. No, I mean in his office. A. In his office, right.

Q. And did he tell you he wanted to prove through you there was no such person as Mr.—what's his name?

Mr. Ruskin: Frank Brooks.
I object.
The Court: Sustained.

Q. Did he tell you he wanted to prove to you as a witness that he was—that there never was any such person as Frank Brooks?

Mr. Ruskin: I object.
The Court: Sustained.

Q. Did he talk to you about Frank Brooks? A. He asked me if I know Frank Brooks.

Q. If you knew him. Is that all he asked you? A. Yes.

Q. In as far as you are concerned, did you hear the telephone number—pardon me. Forgive me. What is your telephone number? A. Market 7-0277.

Joseph Magarill—for Government—Cross

Q. Did you ever have a Lumbard number? A. Never.

[462] Q. All right. Now, I ask you whether or not you know or ever did know, the people who visited or came to see this man Berman, didn't they call him "Honey"?

Mr. Ruskin: I object to the form of the question, Judge.

Mr. Palmer: Just a minute.

The Court: Sustained.

Q. This man, Herman Berman, is that what you called him, Herman Berman? A. Yes.

Q. Wasn't he called "Herman Honey Berman"? Didn't your wife say so to us? A. I don't know "Honey" on that, but I know I used to call him Herman Berman.

Q. Not "Honey"? A. No.

Q. All right. Well, anyway, so far as you are concerned, do you know where Mr. Berman is now? A. In Philadelphia.

Q. Do you know whether the people we were talking about, who came to see you, whether from the defendant or the plaintiff, whether they ever went up to see Mr. Berman?

[463] A. That I don't know.

The Court: Mr. Palmer, what right do you have to say, "whether from the plaintiff or the defendant"? There is no plaintiff or defendant. It is the Government or the defendant.

Mr. Palmer: All right.

Q. When these two men came to see you, or these two people, who didn't tell you who they were and gave you no card, when they came to see you, was Berman still there?

Mr. Ruskin: I object to the form of question.

The Court: Sustained.

You see, you are inserting something in there. He said he just recognized—

Mr. Palmer: All right.

The Court: If you want to ask him if he knows where they came from, maybe he can tell you.

Mr. Palmer: He said he doesn't know. I asked him, "Did they show any credentials?" He said, "No."

Q. You said no, you don't know where they came from? A. That's right.

[454] The Court: You don't know whether they were Government agents?

The Witness: Well, they told me they are from the Government.

The Court: Well, all right.

Q. Did they show you anything to show they came from the Government? A. To tell you the truth, I don't remember.

Q. Now, then, will you tell me, please, whether or not at the time these men came down—what year was that? We are now in 1956. A. I would say they were at my house about three years ago. I am not so sure about it.

Q. At the time, when they came to your house about three years ago, was Mr. Berman, Herman Berman, the dentist, was he still in that office or had he moved? A. No, he was still in my house.

Q. He was still in the house? A. Yes, he was still living in my house.

Q. Do you know whether they went to see Mr. Berman? A. That I don't know.

Q. Did they ask you anything at all about the dentist, no matter what he did, did they ask you anything at all about the dentist, what business he was in?

Joseph Magarill—for Government—Cross

[465] Mr. Ruskin: Your Honor, I am going to object to any further conversations with this witness.

Mr. Palmer: You can't stop me from asking questions. This is no conversation. This is question and answer.

The Court: You see, this is all hearsay, Mr. Palmer.

Mr. Palmer: I am taking hearsay.

The Court: I would have sustained the objections long before this, if they had been made, about any conversations that he might have had. He can tell what he knows.

Mr. Palmer: I am trying to find out what he knows.

The Court: And what the facts are with respect to Berman and his business.

Mr. Palmer: Yes, your Honor.

The Court: But you can't get it by asking questions about what he told agents.

Mr. Palmer: I am trying to find out what he knows, because when he asked him the question, "Did he ever know Frank Brooks?" why, good Lord, there are a lot of Frank Brooks.

The Court: You ask him what he knows about [466] Berman and his business. I think you have already done that.

Mr. Palmer: I will ask him.

Q. Do you know whether or not Mr. Brooks, Frank Brooks, had any relationship of any kind with this dentist? Do you know anything at all about it? A. No.

Mr. Palmer: The answer is no.

Mr. Ruskin: I object to the form of the question. It hasn't been established that Frank Brooks existed.

The Court: Sustained.

Ask him first whether he ever heard of Frank Brooks.

By Mr. Palmer:

Q. Well, would there be any reason why you should hear of Frank Brooks?

Mr. Ruskin: I object to it.

The Court: Sustained.

Q. Will you kindly tell me—you are in the roofing business; right?

The Court: Sheet metal.

A. Right.

Q. You have nothing to do with gold: is that [467] right? A. Right.

Q. Dentists have.

Mr. Ruskin: I object to that.

The Court: Sustained. He is in no position to know that.

Mr. Palmer: You can take judicial notice of that. There are a lot of gold teeth in the world.

Q. At any rate, you don't know who came to visit Mr. Brooks at any time, do you?

Mr. Ruskin: I object, your Honor.

The Court: Sustained. Please don't make any reference to Mr. Brooks unless you have established a proper foundation.

Mr. Palmer: I haven't even established, so far as—never mind, your Honor. You have said enough. I am through.

You can go back to Philadelphia with my blessing.

Mr. Ruskin: Thank you.

The Court: Any further questions?

Mr. Ruskin: No further questions.

* * *

[497] IRVING KERTEZ, called as a witness on behalf of the defendant Carroll, having been duly sworn, testified as follows:

Direct Examination by Mr. Palmer:

Q. What is your name, sir? A. Irving Kertez.

Q. And the name of your business? A. Kertez Manufacturing Corporation.

Q. And your place of business? A. 80 Washington Street, New York City.

Q. How long have you been in business there or any other place in New York? A. Oh, since 1945, September.

Q. What is your line of business? A. Well, at that time we were making costume jewelry and jewelry, watch bracelets.

Q. Bracelets? A. That's right.

Q. Do you know the Sheba Bracelet Company? A. That's right.

Q. Do you know this gentleman—please stand up—Mr. Carroll? [498] A. That's right.

Q. Of that company? A. Right.

Q. Will you kindly tell me, before you came here today did any of the Government agents visit your place in con-

nection with work done for the Sheba Bracelet Company? A. They did.

Q. When did they come? A. About a week and a half ago, two weeks ago.

Q. Is that the first time they came? A. That's right.

Q. Did they show you their credentials? A. That's right.

Q. And did they give any names? A. They did, but I don't know the names.

Q. Now, will you kindly tell me then, when did you do work in making bracelets for the Sheba? Just tell me when. A. I believe 1950 or '49. I have it in—

Q. We will get to that in a minute. Did these agents ask to look at the books of your concern, to see whether or not you did make bracelets for the Sheba? A. They asked—they told me it is not necessary [499] for me to show them, but if I want to, they would appreciate it.

Q. Did you? A. I did show it.

Q. In other words, you showed the agents of the Government, who came to you for the first time about a week and a half ago, that you did manufacture bracelets for the Sheba? A. That's right.

Q. Now, will you kindly tell me, was this the nature of the bracelet? A. That was the nature of the bracelet.

Q. I beg your pardon? A. That was the nature of the bracelet.

Q. Made for the Sheba? A. That's right.

Mr. Palmer: I offer the bracelet in evidence.

Mr. Ruskin: May I see it?

Mr. Palmer: One question before I give it to you.

Q. This is made of gold, isn't it? A. May I see that?

Q. Yes, of course.

Mr. Palmer: At the end of the day, may I take [500] it away with me, if your Honor please, because I think gold in this room at the present moment is—

A. Yes, it is gold; yes.
Q. Gold? A. Yes, 14 carats.

Mr. Palmer: I offer it in evidence.
Mr. Ruskin: Let me see it.
(After looking) No objection.
Just one moment. I would like to establish—
Mr. Palmer: I don't want to have any argument.
Mr. Ruskin: Then I object on the ground that proper foundation has not been laid and that the witness has not testified about when this manufacturing was done.
Mr. Palmer: He just said '49 to '50.
Mr. Ruskin: I would like him to check his records so that we know.
Mr. Palmer: Wait a minute. You are ahead of me. Thank you for helping me. I was going to ask that question next. Forgive me; if I ask it now.

Q. Is the book in front of you now the book that you showed the agents of the Government? A. That's right, sir.
Q. And the entry of the Sheba Bracelet? A. That's right.
[501] Q. Now, will you kindly tell us when you manufactured bracelets for the Sheba Bracelet Company, made out of gold? A. Approximately October, '50, 1949.
Q. And will you kindly tell us how many bracelets you manufactured for him at that time? A. A total we were paid for the bracelets of $608.05. That is, that is what we were paid for the labor of manufacturing the bracelet. That does not include the cost of the gold.

Q. Who furnished the gold to you? A. Sheba.

Q. Now, in connection with your line of business, were you acquainted with the fact that in order to furnish you with gold it had to be from a person engaged in the manufacturing of jewelry? A. That's right.

Mr. Ruskin: Your Honor—

Mr. Palmer: "That's right," he said. What's wrong about that?

The Court: All right.

Mr. Ruskin: It is done.

The Court: I haven't been able to hear the objection and it has been answered. Go ahead.

[502] Q. Now, then, will you kindly tell me, after October did you do more work for the Sheba? A. I did not.

Q. Will you kindly tell me, is there—here is where I am going to run into something—this particular process that you used on this exhibit, which is now being fixed up by the Clerk, what do you call that? A. It is a basket weave bracelet.

Q. Now, I call your attention to this kind of a bracelet and I ask you only as to how that is made? A. It is a different process.

Q. What is the process?

Mr. Ruskin: Your Honor, I object unless this witness is qualified. I mean, Mr. Palmer is now dropping bracelets in front of him out of the air and—

Mr. Palmer: Pardon me, please. On the voir dire I ask that he examine him as to his qualifications. The man has been in business all these years.

The Court: You see, there is no proper foundation laid for the use of any other bracelets.

Mr. Palmer: No, no. Pardon me. I am not asking about the bracelets. I am asking the process, is

there any other process besides that used in the manufacture of bracelets?

[503] The Court: It is entirely hypothetical and exploratory to inquire about other bracelets which are not properly before us in evidence.

Mr. Palmer: I am sorry, if your Honor please.

The Court: Do you represent that you will offer that in evidence?

Mr. Palmer: Of course.

The Court: Well, then, why don't you go into the manufacturing process at the time it is offered into evidence?

Mr. Palmer: Because I can't carry this witness along with me. After all, he is not doing himself any favor by being in court. I want to bring out before the Court through an expert that there are other ways of making bracelets, and we say the way we made them in the place was in addition to the method by which he made bracelets for us. I wanted to bring out the difference in methods.

The Court: I don't see how you can use this witness for this purpose.

Mr. Palmer: I am going to ask the question, if your Honor please, and you will do the ruling, as is usual, and I will obey whatever your Honor says in the matter.

[504] *By Mr. Palmer:*

Q. I call your attention to a rectifier for electroplating vacuum machine, used in preparing for casting—

Mr. Ruskin: Your Honor, just a moment.

Mr. Palmer: Can't I finish the question?

Mr. Ruskin: No, I am going to object at this point to Mr. Palmer reading from an exhibit now in

evidence and confronting the witness with a document in evidence and asking him a hypothetical question.

Mr. Palmer: I haven't in any wise confronted him with anything. I am asking him a question and I am trying not to fall over my own words in getting the definite kinds of machines that have been mentioned in this, to see whether or not those machines make a different kind of bracelet, whether it is made by casting or otherwise, whether it is used for that purpose.

The Court: You want to ask this witness whether the machines that are listed on an exhibit in evidence can be used for the purpose of making a certain type of bracelet?

Mr. Palmer: I didn't even want to go as far as that, because I thought I was hesitant before your [505] Honor let me do that.

All right.

The Court: It is proper to do it the way you are doing it, but if it is going to shorten his testimony I will permit you to show him the exhibit, ask him to look at the names of the types of equipment appearing on that paper and then put a question to him.

The witness is now examining Court's Exhibit 6-A in evidence.

The Witness: I will have to refer to this again if he asks me some questions.

Q. In other words, in connection with that, will you kindly tell me, are bracelets made by a stamping method? A. My bracelets was made by stamping method.

Q. What other method is there? A. Well, you could make it from bar stock and pinning it together. There is a lot of ways of making bracelets.

Q. Can you make it by casting? A. Well, you make the basic part by casting. Then you have to refinish it then. You can't sell it from casting, that is it.

Q. But you can make it from a casting? [506] A. Yes, starting out with a casting.

Q. Now, when you start from casting, would you please tell me in your own way, starting with the gold, what process is carried through to make the bracelet from a casting, as distinguished from your method of plating?

Mr. Ruskin: I object to this line of questions as being irrelevant.

The Court: Sustained.

Mr. Palmer: Exception.

I ask to be marked for identification all of these bracelets.

The Court: It is going to take too much time right now. I thought this is a short witness.

Mr. Palmer: Well, I consider him short. Judging from the witnesses for the Government, this is going to be a very short witness.

The Court: Just the marking of those bracelets for identification is going to take a long time. Do you propose to ask this witness to explain the manufacturing processes of these bracelets?

Mr. Palmer: No, you said no. I only want to ask him from what process these particular bracelets, which are marked for identification, will be part [507] of this case, are made, if he knows.

The Court: Well, I think we had better take a short recess.

We will have a short recess, ladies and gentlemen.

Will you step down, please, just a moment while I confer with counsel.

(Witness temporariiy excused.)

(Short recess.)

The Court: Go ahead.

Mr. Palmer: Before I proceed, there is one question or two that I want to ask.

By Mr. Palmer:

Q. When you testified about making the bracelet—

Mr. Palmer: Has that been marked?

The Clerk: No, that has not been marked.

Mr. Palmer: I offered that in evidence and it went into evidence.

Mr. Ruskin: No, it didn't.

The Court: Was there a pending objection to this bracelet?

Mr. Ruskin: Yes.

The Court: This is the one that the witness—

Mr. Palmer: He made for us.

[508] The Court: —the witness said he made for Sheba.

Mr. Palmer: Before he said "No objection." Is there an objection now?

Mr. Ruskin: I said by objection, your Honor, was that this manufacturing was done in October of 1949.

The Court: Yes.

Mr. Palmer: So far as they are concerned, the conspiracy is supposed to start in September, 1949. This is after the date of conspiracy, not before.

The Court: Let Mr. Ruskin finish his objection.

Mr. Ruskin: My contention, therefore, is that any evidence of manufacturing done approximately two years before the Government's evidence in this case of the conspiracy would be irrelevant.

The Court: No, I will allow it on the ground that it comes within the terms of the Government's proof.

I therefore think it is relevant. Your objection is overruled.

Mark it in evidence.

(Marked Defendant's Exhibit G.)

Mr. Palmer: May I start again, because I [509] thought it was in evidence?

Q. I call your attention to Exhibit G, which you just had in front of you, made by your organization. Was this made by an automatic machine? A. There is a lot of parts in there. Some of it was made by automatic machine.

Q. Will you kindly tell me, when you told his Honor, pointed out that the bill you gave us for making these bracelets was $608, approximately how many, to your knowledge, bracelets were made for the $608? A. Approximately 300 pieces.

Q. That is outside the gold? A. No, the gold was supplied to me by Sheba. I got $608 for the labor of making the pieces.

Q. About how long would it take with all the machines and the pieces you are talking about to make these particular bracelets? A. Approximately a week.

Q. Now, I ask you to look, if you please, at a certain batch of bracelets, and in connection with that will you kindly tell me, from your knowledge of the bracelet manufacturing business, are there the following kinds of different methods used: Casting, stamping, automatic centrifugal, wax, mold casting, bar stock, and [510] other methods?

Mr. Ruskin: Your Honor, I feel—

Mr. Palmer: Wait a minute. You said save time, didn't you?

Mr. Ruskin: I object to the question as being leading. I think he should ask the witness.

The Court: Yes, sustained.

Q. Will you kindly tell me then how many different kinds of methods do you know of in connection with the manufacturing of bracelets? A. Well, the bracelet that you mentioned, this is the one that we manufactured, that is completely stamped, and everything is supplied in sheet stock, and we stamp it out, and then it is assembled and it is polished. That is a stamp.

And there is a turn, where you get parts, turn it upon a screw machine, and then you pin it together, that is, from a turning.

Then you have the so-called casting, which is by different casting processes, but still it is a casting, and it is polished up, pinned together, and that is a cast bracelet. Those are the three basic bracelets.

Then there is the wire-forming bracelet, too.

[511] Q. In connection with the particular method used, does part of it consist in polishing? A. Oh, yes, that is one of the operations. In each one you have to polish it.

Q. In connection with such operation you described generally to the jury does dust come off of the various parts of the bracelets? A. Oh, sure.

Q. Dust? A. Oh, sure, positively. We got—we sold our dust. The dust collector that collects the dust from the polishing, Handy & Harmon, will refine that dust and then pay us for whatever gold is left in the dust.

Q. Will you kindly tell me—

Mr. Palmer: This is one of the '49ers, if your Honor please: this is a new method.

Q. Would you kindly tell me who is Handy & Harmon? A. Handy & Harmon are one of the largest gold refining corporations in New York City.

Q. And so far as that is concerned, when the dust comes off of the polishing in the making of these particular gold bracelets, even the dust is sold to [512] Handy & Harmon?

A. Well, the dust is not sold. They collect the dust and whatever gold they have they will charge you for the refining, and whatever is left over the refining, of course, you get.

Q. In other words, as far as they are concerned, they take the dust, refine the dust, and they pay you for whatever gold comes out of the dust. A. In connection with the refining.

Q. In connection with your business, have you been selling gold dust in that particular fashion over a period of years? A. Oh, yes.

Q. Do people in the same business do the same thing? A. Oh, yes.

Q. Now, I call your attention to Exhibit H for identification, and I ask you whether, so far as you are concerned, you can recognize by an examination—

Mr. Palmer: I wouldn't be a good jewelry salesman. I don't know how to open a box.

The Court: Let the witness do it.

Mr. Palmer: You open the box.

The Court: May I state for the record, Mr. [513] Palmer, also for the information of the jury, that you have stated in connection with these bracelets you are about to show Mr. Kertez, that you intend to show by later proof that they were manufactured by Sheba Bracelets in the regular course of their business.

Mr. Palmer: I will go further than that.

The Court: No, that is all I want to say.

Mr. Palmer: All right.

The Court: Because on the basis of that representation—

Mr. Palmer: That is true.

The Court: —I am permitting you to ask this witness how they were made.

Mr. Palmer: That's right.

The Court: All right.

Q. Now, will you look at these particular bracelets—were there a couple of more in there? A. That is all. You have some more in the bag.

Mr. Palmer: I am the keeper of the gold.
The Court: All right, go ahead.

Will you kindly tell me what method was used in connection with these bracelets, this exhibit for identification, marked H? [514] A. Well, basically they are all, this is all—all the bracelets over here are stampings; in other words, by stampings through a press and pressed out and assembled and polished.

Q. The stamping, that is done on the gold with other alloys to make a bracelet? To make a bracelet, do you have to use alloy? A. The material is already alloyed. It is in a sheet form, in a specific thickness and specific width, and it is stamped out with so-called dies, which are in a stamping press, and you get your parts that way and then they are assembled together and polished up and then you have your finished item.

Q. And before it is finished as a bracelet, the dust you talk about comes off in connection with the polishing? A. That happens in the polishing stage.

Q. In the polishing stage, all right. Now, I call your attention to the same paper, marked Exhibit H—

Mr. Palmer: And your Honor remembers that we were separating them so as to make it more convenient.

Q. —and I call your attention to this batch [515] of bracelets that are contained therein, and tell me what method was used in connection with the manufacture of those bracelets, if you know? A. This is still stamping.

Q. Anything else in connection with that? A. Well, there is a few turnings in there, small turnings, which is

combined with stamping. It is a combination stamping and turning.

Q. In what respect do you use a centrifugal machine? A. There is none in there.

Q. Now, I call your attention to this particular bracelet, coming out of the same Exhibit H. A. This is still stamping.

The Court: They are all stamping.

Q. And what are these? I will give you a handful. A. Those are parts—I saw them. Those are integral parts of basic stamps, of how these things are before they are assembled.

Q. In other words, they are basic parts of the so-called finished bracelet?

The Court: So it is all part of the stamping process.

[516] The Witness: That is right.

Mr. Palmer: Now, if your Honor please, subject to connection, I offer this batch of bracelets, marked Exhibit H, as indicating the stamping method.

The Court: Well, subject to connection.

Mr. Palmer: I said subject to connection. Didn't you hear me say subject to connection?

The Court: Yes, but I say the offer should be made at the time the connection is established, it seems to me.

Mr. Palmer: Well, I thought I could show them now, and then afterwards if I don't connect them I would be very foolish to say in front of a jury that I am going to connect them if I don't intend to connect them. But I think as far as I am concerned, as an exhibit, I can take it away with me.

The Court: All right.

Mr. Palmer: I am perfectly willing to do this, because I don't want anyone to think for a moment that we are going to switch any bracelets on them. I will let Mr. Ruskin put them in the safe before we get through with the trial.

The Court: He may not wish to have them.

Mr. Palmer: I don't mind. He is an honest [517] man. He may be mistaken, but he is honest.

(Defendant's Exhibit H for identification, consisting of twenty-five pieces of stamping, received in evidence.)

The Court: Now, will you show the witness the other methods, too?

Mr. Palmer: Can I go ahead?

The Court: Yes.

Q. I call your attention to what I take out of Defendant's Exhibit I for identification.

The Court: Take them all out.

Mr. Palmer: I am going to do it.

The Court: Because they have already been separated.

Ladies and gentlemen, we have tried to save some time by having the witnesses go through all of these bracelets which Mr. Palmer had, so that he could divide them up according to different methods of manufacturing, hoping that we could profit by the time we spent during the recess.

Q. What method is this? A. This is cast.

Q. Casting. Now, will you explain to this Court and jury what you mean by casting as distinguished [518] from a stamping method? A. Well, a stamping method is a physical—there is no change of the materials. You just use a pressure, so-called power press, and a die, and by a casting you got heat involved and centrifugal casting amounts to a totally different process.

Q. But I want you to tell us about the process, because though we are not in a school, you are teaching us nevertheless. What is this process? Tell us so that they will understand it. After all, they are the jury and I am only a lawyer. A. Well, you take the gold or whatever alloy you have and you have a certain wax mold, which is invested, and when this is turning you pour your gold into it and you get these parts out. That is very rough parts.

Q. Then what do you do? A. Well, then, you assemble it, polish it. That is just the beginning, the cast. The major work is after it gets cast, to finish it all up.

Q. In connection with that particular method, the casting method, as you have described it, does dust come off that gold? A. Then you polish this, too, in which dust comes [519] off.

Q. Still as far as you are concerned, that dust can then become valuable if there is any gold in it? A. Dust is not a major thing.

Mr. Ruskin: I object, your Honor.

The Court: Sustained.

Mr. Palmer: I am just carried away.

A. (Continuing) The dust is not a major item about it. It is a very minor item.

Q. It is an item; it accumulates on the machines. A. You have dust collectors in there while you are polishing that collects up the dust, and which is an abrasive, in polishing it is an abrasive process and you eventually take off some of the material.

Mr. Palmer: I offer in evidence, if your Honor please, subject to connection as before, Exhibit I, being the casting method.

The Court: Mark it Exhibit I.

(Marked Defendant's Exhibit I.)

Q. Are sinks with two barrels underneath that used for catching the sweeps in connection with either one of these methods? Yes or no.

Mr. Ruskin: Your Honor, Mr. Palmer is again [520] engaging in a line of cross-examination that your Honor told him not to do before.

Mr. Palmer: I didn't hear that.

Mr. Ruskin: He is once again reading from that same exhibit and asking this witness—

Mr. Palmer: So far as I am concerned, if your Honor please—

Mr. Ruskin: That is a memorandum of an agent.

Mr. Palmer: I have a perfect right, in my estimation, to pick up a sentence which may or may not be grammatical or otherwise, and ask him whether or not in connection with any of these methods certain things are used, if he knows.

The Court: All right, I will allow it. Go ahead.

Q. In connection with any of these methods, do they use a sink with two barrels underneath to catch the sweeps? A. Oh, yes.

Q. I beg your pardon? A. Yes, in the casting.

Q. Explain it. A. Well, just while you are washing your hand, when your hand is being washed, there is gold [521] collects off there. I mean, gold is a very small, minute particle, and in washing hands, or washing equipment there is always a minute amount of gold in there, and when you have these collectors, you collect the water let it settle and you get your waste.

Q. Do you also use a tumbler barrel? A. That is for polishing.

Q. What does a tumbler barrel have to do with polishing? A. It is a different process of polishing. It is a tumbling while it is turning abrasives in it. It is a cheaper way of polishing than the wheel.

Q. Does that polishing method result in any residues? A. Residue?

Q. Yes, anything? A. Well, whenever you are handling gold there is always a residue. You always have to be careful on that.

Q. Now, do they use a rectifier for electroplating? A. That's right.

Q. What is that used for? A. That is changing the current. The current that you get is AC current and you need DC current for [522] plating process.

Q. An arbor press; is that used? A. That's right.

Q. What is an arbor press used for? A. Used for assembly and for actually making small parts.

Q. In connection with the manufacturing of bracelets? A. Yes.

Q. What is an electric furnace used for? A. Well, there is a lot of different reasons for it.

Q. Do they use that in any of these methods? A. You can use it in the casting process.

Q. And a vacuum machine? A. That is definitely the casting process.

Q. That is for the casting process? A. Yes.

Q. And baker burner oven, what is that used for? A. Well, that is burning out the wax for centrifugal casting.

Q. And they have waxing machines? A. Yes.

Q. What is that used for? [523] A. Well, that is injecting the wax into these forms and the rubber mold.

Q. And the wax smelting pot, what is that used for? A. Well, melting the wax for injection.

Q. And the vulcanizer, what is that used for in this process? A. Well, to make your forms.

Q. What do you mean by "forms"? A. Well, whatever you are going to make, first you decide, let's say, to make a cross. Well, before you can make the cross you have got to have a master for it, so you make a master and you invest it, you put it into rubber to get your master, and from that

you get your wax images, which you will eventually use in the cast.

Q. In casting bracelets? A. That's right.

Q. What is a power saw used for? A. Well, it is used for any number of purposes.

Q. Is it used in connection with some of the methods? A. It is a manufacturing machine.

Q. And what is a centrifugal casting machine? [524] A. It is a final process in the casting process.

Q. Casting of bracelets? A. Any casting.

Q. And the melting furnace? A. You have got to melt your material before you can cast it.

Q. You mean alloys as well as the gold? A. Oh, yes, the alloys, and you can alloy your material there.

Q. Is a melting furnace, do you know how that is heated? Do you know if that is heated by electricity? A. Electricity or gas.

Q. Either one or the other? A. Yes.

Q. And riveting machine, what is that used for? A. It is an assembly machine.

Q. And when you use the riveting machine, does that in any wise bring any dust into existence? A. Not anything material.

Q. But some? A. There is no dust over there.

Q. And the polishing machine? A. That is the one that creates the dust.

Q. That is one that creates dust. [525] A. Yes.

Mr. Palmer: I ask to have these two particular items marked for identification.

The Court: All right, very well.

This paper that you have been reading from for the purpose of forming your questions, is that 6-A?

Mr. Palmer: It is Court's Exhibit 6-A, yes, your Honor.

The Court: That is the paper the witness already consulted before and you asked him a lot of questions, isn't it? Didn't he already answer all these questions before?

Mr. Palmer: No, I didn't ask him, because at that time—

The Court: All right.

Mr. Palmer: No, I didn't ask him about these questions, because I didn't get up to it yet until your Honor allowed these to go in evidence.

(Marked Defendant's Exhibit J for identification.)

Q. Now, I call your attention to your expression before about "rubber mold," and will you kindly tell me— A. That is a rubber mold.

[526] Q. Rubber what? A. Rubber mold.

Q. Spell the last word. A. M-o-l-d, mold.

Q. What are rubber molds used for in connection with casting? A. Well, here you inject your wax.

Q. In where? A. Right in here.

Q. Inject the wax in there? A. That's right.

Q. What happens then? A. Then it solidifies there and you use that in connection with the centrifugal casting.

Mr. Palmer: I offer, if your Honor please, in evidence, in connection with the witness's testimony, these rubber molds as a model.

(Marked Defendant's Exhibit K for identification.)

Mr. Ruskin: Once again, your Honor, I assume that this is being offered subject to connection.

Mr. Palmer: Of course.

Mr. Ruskin: On Mr. Palmer's representation.

Mr. Palmer: Of course. Not only my representation [527] and my agreement, but you can't go

before Judge Palmieri and say something and have him forget it.

Mark it in evidence.

The Court: Mr. Palmer, how much longer do you think you will take with this witness?

Mr. Palmer: At the most, three minutes. How is that?

(Defendant's Exhibit L received in evidence.)

Mr. Palmer: Three minutes, all right?

The Court: Yes.

Q. I call your attention to these particular objects and tell me what those are, in connection with the testimony? A. Same as before, they are rubber molds.

Q. They are a little different from the other ones, aren't they? A. A little different.

Q. What has the letter 8 got to do with it? A. That is the form.

Q. In which it will come to in the end? A. The wax will come and the final item will take the same shape.

Mr. Palmer: All right, I will offer these molds.

[528] The Court: Subject to connection.

Mr. Palmer: Subject to connection, of course.

The Court: All right, mark it.

(Marked Defendant's Exhibit M.)

Q. Now, in connection with the methods that you have described, will you kindly tell me—look at this particular little cover and tell me what they contain, if you know, used in the manufacture of bracelets, by any method? A. These are stamping the component parts, like you had.

Mr. Palmer: I don't think the jury heard you.

Q. Stamping what? A. These are stamps of either the component parts of the bracelets we had previously, that was made by the stamping process.

Colloquy in Connection with Motion to Suppress

Q. These are used in that connection? A. That's right.

Mr. Palmer: All right, I offer this batch subject to connection, if your Honor please, as part of the process, subject to connection.

(Marked Defendant's Exhibit N.)

The Court: All right, what else, Mr. Palmer?
Mr. Palmer: Your witness.
[529] The Court: Have you finished now?
Mr. Palmer: May I take these with me or should I leave them here?
The Court: Take them with you.

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[551] The Court: Well, he has made that claim without contradiction with respect to all of the books of account and business records of Sheba Bracelets Company, and he has led me to believe without any contradiction from you that they were all taken at the time of the search.

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[553] The Court: I will give you an opportunity to reply, but it seems to me that if the arrest were illegal, and unless the search at Coney Island Avenue could be justified as being a proper search incident to a legal arrest, since concededly it was without [554] a search warrant, that any evidence or clues obtained as result of that search, regardless of whether you seized papers, they made an inventory, they looked at the place, they did a number of things which tended to be of assistance to the Government in this case as a result of what Mr. Palmer claims was an improper invasion of privacy, and therefore constitutes an illegal search. Now if that is true, then wouldn't it be incumbent upon me to strike down any evidence or proof that came as a result of that action? Isn't that precisely what the constitutional principles involved require?

Mr. Ruskin: Only so far as there is an invasion of a person's privacy or where there has been an abuse of his constitutional privileges.

The Court: It is conceded here that that office was the office of at least three persons, the two corporations whose names are on the door; and Mr. Carroll's office. As a matter of fact, I think that you have stressed the fact that the witness Sciabica looked to Carroll as his employer. You stressed the fact that this was one of Carroll's offices, and the reason why the agents went there, in addition to going there to look for proof against Sheba Bracelets, Inc. was, as I understand it, to seek [555] evidence against Carroll, the individual.

Mr. Ruskin: Your Honor, I think that the agent testified that there was a warrant out for the arrest of Emil Popper at the time they went out to Sheba Bracelets and they were looking for Emil Popper, so that they could place him under arrest, and Emil Popper, so far as the agents knew—

The Court: Let me hear Mr. Palmer. I don't want to interrupt him any further. You will have an opportunity to reply.

Mr. Ruskin: I just want to state first, that as far as any knowledge I have is concerned, there were no books or records seized from Sheba Bracelets by any Secret Service agents.

The Court: I am going to ask you before I finish to provide me with very complete and detailed affidavit from persons who have the knowledge, because I cannot rule on an objection of this nature without having a complete and clear record of what occurred. I do not have such a record and that must be furnished me by affidavit.

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[556] The Court: I am dealing on the one hand with impressions and with your recollection, and on the other

hand with very serious assertions of invasions of constitutional rights made by Mr. Palmer. So that I would need, I think, at least the same type of records that any judge would need if this were made the subject of a motion. Then I will come to the question of waiver later.

[557] Mr. Palmer: Your Honor, in addition to that I say that in the records that they have in that office, at the time when they came without a search warrant, are the records of the Carroll Instrument Company, which is not mentioned in this indictment and have nothing to do with it, and we claim, so far as that is concerned, when they took away the books of the Carroll Instrument Company and they removed from the body or from the pockets of Mr. Carroll, when they took him down to Church Street after this illegal arrest, papers and documents, that all these particular papers and documents were obtained in violation of his constitutional rights, of which the Circuit Court of Appeals has written time and time again, and I suppose also the Supreme Court of the United States has also had its say, and therefore, in connection with any affidavits being furnished to you, I desire, with your permission, of course, to have them give you an itemized list of the records they took from the pockets of Mr. Carroll when they took him down for hours and hours and interrogated him down there in Church Street after what began with an illegal arrest, which so far that is concerned thhey said they made it legal by giving the warrant afterwards.

[558] Now, we say to your Honor that those particular papers that they have may, as your Honor very well put it, and as the Circuit Court of Appeals has said, the question is what kind of rotten fruit was on the tree at the time they began to invade our constitutional privileges? And in order to make that clear, I want you to know that in this case I contend this case is synthetically built, for this reason, and in no other way could they have done it.

It appears affirmatively that when Mr. Kaplan had this case years and years, and the records which I saw yesterday disclosed the fact—and that goes to what you are going to speak about afterwards—my client appeared for himself and the corporation and pleaded not guilty. As I understand it, he never had a lawyer in this case at all. He didn't think he needed a lawyer, because for years and years this case was dormant; no one ever bothered about it. His brother-in-law, a lawyer, came down once in a while to find out if the matter had been adjourned.

The case suddenly assumed life and strength at the time when Mr. Ruskin walked into the scene, only some time around June of last year. That was [559] over four years.

Now I contend, if your Honor please, among other things in this case, that the fact that the Government didn't press the case and adjourned it by itself during all that period of time puts me in the position of the case of United States v. Provoo. I contend in this case that because of the action of the Government, that witnesses who had been available at the time, like Adler, for instance—you see they got statements from whom they saw at that particular time—were no longer available, because my client was left to his own resources, didn't know this case was coming on for trial, wasn't being pressed for trial, and over a period of over four years the people who worked in this place—and bear in mind yesterday I asked was there a payroll book, and the witness, you remember, Bloom, said there was and there were other books. Now there is no question in my mind that in that box over there, Pandora's box—I think that is a classical allusion which I know your Honor will understand—that there are any number of checkbooks, any number of other books of both concerns. Under the circumstances, I want your Honor to know that I contend that whatever [560] attempt was

made synthetically to build up this case, to put some fat on the lean shanks of the case when Mr. Ruskin got on the scene, was evidenced by the fact that this man from Philadelphia, who came on the witness stand yesterday to testify to a negative, that he doesn't know of this particular person, who could have come to that dentist's office and been a partner of the dentist in the balance, that he was brought in to make it appear before the jury that there was no such person.

* * *

[637] The Court: What have you to say with respect to the alleged illegal seizure of records and the alleged illegal arrest of Carroll, his improper detention, and the obtaining of papers, clues and other evidence, both from his person and from his place of business? Because there is a very sweeping motion made by Mr. Palmer to the effect that all of that evidence, all of those clues, should be taken from the case, and if they are taken from the case, of course there is very little left of the case.

Mr. Ruskin: Well, as I understood your Honor's ruling before, you asked me to submit an affidavit, but I will state now on the record that first I believe the arrest of Mr. Carroll was a legal arrest, based upon probable cause on the part of the agent to believe that a felony had been committed by Mr. Carroll.

The Court: You think that the physical possession [638] of the warrant made no difference?

Mr. Ruskin: I say that is correct, your Honor. I say that even assuming Mr. Carroll's arrest was illegal, there is not a shred of evidence in this case that anything taken off the person of Mr. Carroll pursuant to that arrest had been used in this case or that any leads or fruits of the crime on the part of Mr. Carroll were obtained from those documents.

The Court: How about the inventory of the alleged jewelry equipment on Coney Island Avenue and obtain-

ing the name and address of this young man, who is an employee there, who became a witness for the Government? Weren't those leads and wasn't that information all obtained as a result of a visit to his place of business that day? Can you justify that as an incident of the arrest? Or do you say that it has nothing to do with it?

Mr. Ruskin: Well, our position would be that it had nothing to do with it; that when the agents went out to the premises in Brooklyn, they had an arrest warrant for Emil Popper, and that they they were looking for Mr. Popper to execute that arrest warrant; that when they went out there, nothing that they obtained would come wihin the meaning of any of the [639] cases which preclude the use of the fruits of any illegal search and seizure.

The Court: Well, of course, that is quite a statement. They didn't arrest Popper, so that it couldn't have been incident to Popper's arrest.

Mr. Ruskin: No, I say that is why they went there, your Honor.

The Court: No, but as I understand the law, in the absence of a warrant permitting a search and seizure of private premises, it can be done only as an incident to a lawful arrest.

Now, Popper was not arrested, so it couldn't be an incident to his lawful arrest, notwithstanding the fact they had the warrant to arrest him, and Carroll was arrested.

So, assuming Carroll's arrest was legal, it must be considered an incident to Carroll's arrest. Otherwise, it wasn't an incident to anybody's arrest; it was plainly an invasion of private premises, and to the extent that clues and information were concerned, is it proper to consider them as legal evidence in this case?

Mr. Ruskin: If your Honor is referring to the fact that the agents, while out in Brooklyn, saw [640] the Adlers, for instance?

Colloquy in Connection with Motion to Suppress

The Court: No, I am not talking about the third party statements point at the moment. I would like to hear about that, because I think that that issue has been very carefully defined, and I think the cases should dispose of that, and I hope you will point that out in the brief. I am thinking now of the complaint about the visit, the inventory that was made, such information that was obtained at the Coney Island Avenue, the day of Carroll's arrest without a warrant; now, how is that justified?

I wish you would look at the cases of United States v. Rabinowitz, 339 U. S., Trupiano v. United States, 334 U. S., and Rent v. United States, 209 Fed. (2d). You need not take them down. I have already made them up in a slip which I will have Mr. Hellenstein give you citations. However, they are three cases which concern me a great deal, because if you attempt to justify what was done here as an incident of Carroll's arrest, then it would seem that there might be some question about it.

Mr. Ruskin: Your Honor, that is not our position. I feel that this search of the premises—it is my present position that the search of the [641] premises or the inventory taken at the premises of Sheba Bracelets in Brooklyn would not be incident to Mr. Carroll's arrest.

I do feel that the Government's position must be that Mr. Carroll and Sheba Bracelets were the holder of a gold license, that pursuant to the terms of that gold license the agents of Secret Service and the people employed by the Assay Office could come to the premises to see if the conditions under which the gold license was issued were being complied with.

The Court: In the normal course of their investigation.

Mr. Ruskin: That is correct, sir.

The Court: You say that that would not be affected by the fact that they had a warrant of arrest out for

various people related to this business in one way or the other, and that the moving factor in the business was already in their custody.

Mr. Ruskin: That would be our position.

The Court: Well, you should brief it, because I would be very much interested to see whether the authorities support you.

How about the question of waiver here? You are going to cover that in your affidavit as well, are [642] you, the question of whether or not Rule 12 has been complied with? Because these questions are being raised in the midst of trial, when it seems to me they might have been raised along before trial; and if I recall correctly, you quoted Mr. Palmer as having said that he was concerned about unlawful search and seizure last June.

Mr. Ruskin: That is correct, sir. In fact, he asked me for a list of what was taken from Mr. Carroll's person. He asked me if I would give him a list of that.

The Court: You should make that all plain in your detailed affidavit.

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[657] Mr. Palmer: Of course I was ready, and I am ready now, but the answer is I have uncovered in the course of this case by accident two things which no one ever told me about, one about the arrest without a warrant, and two, going over there without a warrant for the purpose of inspection of the place. How would I know those things until they came out?

The Court: You will have to convince me.

Mr. Palmer: All right.

The Court: You will have to convince me of two things, one, that you didn't waive your rights and two, that you have shown good cause why I shouldn't grant you relief in the middle of trial.

Edward F. Sweeney—for Defendant—Direct
Henry Benach—for Defendant—Direct

Mr. Palmer: That is entirely up to you, but [658] as far as I am concerned, I want you to know that only in the course of this trial, as was developed in the Coplon case, and they said the same thing over there, and the court said that justice demands that if you haven't got the information, when you get it, to make the best use of it for the benefit of justice, and for the benefit of your client.

In this courtroom, when this gentleman was on the witness stand, he said—then you remember the objection was made after that admission came, on the part of Mr. Ruskin, he said he arrested him without a warrant. How did I know my client didn't know he was arrested without a warrant? How did he know? How did my client know there was no warrant over in Brooklyn?

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[700] *By Mr. Palmer*:

Q. Will you kindly tell me, at the time that you [701] had this indirect or direct talk with Mr. Newbrand, did you have in your possession any warrants of any kind, affecting one Diamant or Mr. Carroll? Yes or no. A. No, sir; I did not.

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[728] HENRY BENACH, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Palmer:

Q. Mr. Benach, you were subpoenaed to come here this morning? A. Yes.

Q. Beg your pardon? A. Yes.

Q. At about 8:30? A. 8:30 this morning.

Q. And you objected to that?

Mr. Palmer: I withdraw it. Pardon me.

Q. I call your attention to this gentleman sitting over here, Mr. Carroll; do you know him? A. Yes.

Q. Do you know the Sheba Bracelet Company? A. Yes.

Q. I call your attention—at present, with what organization are you connected with? [729] A. Robert Hall Clothes.

Q. In 1949 and '50 were you in the jewelry line? A. No.

Q. Were you connected in 1949 with the jewelry line? A. No, I was in the export business.

Q. Export business? A. Yes.

Q. In connection with the export business, did you handle jewelry? A. Once, for a period, yes.

Q. Did you handle bracelets, gold bracelets? A. Some kind of a bracelet, I don't know, chains of some kind.

Q. I call your attention to this particular Exhibit G, and ask you whether or not you ever purchased bracelets of the kind similar to Exhibit G from Sheba Bracelets Company? A. Well, I don't remember whether it was this kind or not, to be frank with you, but I did purchase some bracelets, but I don't know whether it was this kind.

Q. Do you recall about how much that order [730] amounted to, of bracelets, about how large an amount? A. I don't recall either, but before I paid him for the goods I know that I had it assayed by, I think it was, Ledoux.

Q. Over in Teaneck, New Jersey? A. I don't know where they are.

Q. Will you kindly tell me was that order for about $32,000? A. I honestly don't know, but they would know, because before I paid him they assayed the jewelry, you know, how many garments—units there were, and so on. I don't know how much it was. I know it somewhere in—I say somewhere between twenty and forty thousand. I don't know exactly.

Q. And did you receive those bracelets? A. Well, certainly.

Q. And did you pay for them? A. Yes.

Q. Did you pay for them? A. Yes.

Q. Did you export them? A. Yes.

Q. Where did you export them, if you recall, was it China? [731] A. I don't know exactly. I know it was—because I had a man handling that part. I think it was—I know it went by air on KLM, and went, I don't, either to Hongkong or somewhere in the Far East, but I don't know where.

Q. This export business of yours, you had employees there? A. Yes.

Q. And did you receive bracelets that you had assayed by Ledoux & Company over in Tenafly, New Jersey, as a result of this purchase from Sheba Bracelet Company? A. Yes.

Q. And was that paid for in regular course? A. Sure.

Q. So far as you are concerned, did you buy any gold from the Sheba Bracelet Company? A. Oh, no, never bought any gold.

Q. What did you buy? A. I bought gold bracelets, though.

Q. Gold bracelets. You also at that time in the export business bought a lot of other items, did you not, for export? A. Yes, I guess about a million or a million [732] and a half dollars a year.

Q. That was about the extent of your business, about a million, million and a half a year? A. Yes.

Mr. Palmer: Your witness.

Cross-examination by Mr. Ruskin:

Q. Mr. Benach; is that right? A. Yes.

Q. What concern were you connected with at the time you had this transaction with Sheba Bracelets? A. Branston Company, Inc., B-r-a-n-s-t-o-n & Company, Inc.

Q. And that was a single transaction, just one transaction? A. I don't know whether it was or not. I can't recall. I don't know whether it was one transaction.

Q. Let me show you Government's Exhibit 18. I direct your attention to the item of October 5, 1949, and—

Mr. Palmer: I object, if your Honor please.

Q. —and ask you if that refreshes your recollection?

Mr. Palmer: Just a moment, please.

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[761] YETTA DIAMANT, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Palmer:

Q. Mrs. Diamant, do you know Mr. Carroll? A. Yes.

Q. Do you know the Sheba Bracelet Company? A. I know them. I didn't—I know Mr. Carroll was Sheba Bracelet.

Q. What is the name of your husband? A. Samuel Diamant.

Q. Is Mr. Fisher your nephew? A. Cousin.

[762] Q. In 1951, did Mr. Fisher work for you? A. Yes.

Q. Were you engaged in business together with your husband?

The Court: I didn't hear the last answer. What was the last answer?

Mr. Palmer: It was his cousin.

The Court: No, the question as to whether he worked for them; what was that answer?

The Witness: Yes.

Mr. Palmer: She said yes.

Q. At any time before you took the witness stand today, did you ever—pardon me. Were you in business with your husband? A. Yes.

Q. You were there in business every day? A. Yes.

Q. Is your husband a sick man? A. Yes.

Q. He is a diabetic; right? A. Yes.

Q. Where was your place of business in 1951, in the month of September? A. 10 West 47th Street.

[763] Q. What floor? A. Third floor.

Q. About how big, about how many stories are there in that building? A. I can't tell you exactly, but there should be—I think there is about eleven or more.

Q. Are there, to your knowledge, a great number of tenants in that building? A. Yes, sir.

Q. About a hundred or more? A. I don't know whether it is a hundred or whether it is sixty or seventy or over a hundred.

Q. But a great many tenants, a great number of tenants? A. Yes, sir.

Q. In the jewelry business? A. Yes.

Q. Will you kindly tell me, at any time before you took the witness stand today did you or your husband ever buy any gold of any kind from the Sheba Bracelet Company or from Mr. Carroll? Yes or no. A. No.

Q. I beg your pardon? A. No.

[764] Q. At any time before you took the witness stand today did Mr. Carroll ever leave any gold in your possession in your premises? A. You mean in my offices?

Q. Yes, in your offices? A. No, not to my knowledge.

Q. Will you kindly tell me, on September the 28th, 1951, did you meet a gentleman by the name of Mr. Sweeney? A. Yes.

Q. Did you meet a gentleman by the name of Mr. Newbrand? A. Yes.

Q. Did they come into your office? A. Yes.

Q. And when they came there, was your husband there? A. Yes.

Q. And when they came there, was Mr. Fisher there? A. Yes.

Q. Did they conduct a search of your premises? A. Yes.

Q. Was any gold of any kind of character found in your premises? [765] A. Well, watches, jewelry.

Q. No, I am talking about in the form of gold bars. A. No, sir.

Q. What business were you and your husband in? A. Jewelry business.

Q. In watches and watch repairs? A. Watches, rings—everything concerning jewelry.

Q. Did Mr. Carroll have any watch repair business in 1949 and before that time with your organization? A. Yes, he used to bring up repairs to us.

Q. And you did the repairing work for him? A. Yes.

Q. Where those repairs sent? A. Well, they were given to watchmakers or to the manufacturers that work for us.

Q. In so far as you are concerned, did you have a cousin in the same building, who was in the repair business, in the year 1949, '50 and '51? A. Not in the same building.

Mr. Ruskin: Just a moment. I object to the question as being irrelevant.

The Court: Sustained.

[766] Mr. Palmer: Exception.

Q. Did you give any watch repairs of any kind in the year 1949, '50 or '51 to anybody in the building on 47th Street, 10 West?

Mr. Ruskin: Your Honor, I object.

A. Maybe—

The Court: Sustained.

Mr. Palmer: Exception.

Mr. Ruskin: Will you please instruct the witness to please withhold her answer when she sees me stand up?

Mr. Palmer: She hasn't said anything.

Mr. Ruskin: Yes, she has.

Mr. Palmer: I didn't hear it.

The Court: If there is an answer, the jury is instructed to disregard it. It will be stricken.

Mrs. Diamant, if the lawyer gets up to make an objection, it means there may be something wrong with the question and I will have to ruie. So please withhold your answer.

The Witness: Yes.

Q. Will you kindly tell me in September, 1951, when these men came into your place and searched your premises, did there come a time when several people in [767] your place were taken out?

Mr. Palmer: Strike that out, please.

Q. Did there come a time on that day when any people in your place were taken away to 90 Church Street? A. I don't understand the question.

Q. On that day, was your husband and were others put under arrest? A. My husband, yes.

Q. So far as you were concerned, was Mr. Fisher put under arrest? A. Well, we were asked to go downtown with them.

Q. They said they had a warrant for you people? A. I didn't ask.

Mr. Ruskin: Your Honor, I object to the question.

The Court: Sustained.

Now, you are going into other matters, not even the warrants in this case that I told you not to talk

about, and you certainly can't go into other cases which are not before us.

Now, don't tell me what you have in mind. I am not interested. I sustain the objection and I direct you not to inquire into the alleged legality [768] or illegality of other people's arrests.

Q. Will you kindly tell me, did you go in an automobile together with Mr. Carroll and some others to 90 Church Street? A. Not with Mr. Carroll.

Q. With whom did you go? A. With Mr. Sweeney and Mr. Newbrand and my husband.

Q. And was Mr. Carroll in that particular automobile? A. No.

Q. When you came to 90 Church Street did you see Mr. Carroll? A. I saw him in one of the other rooms.

Q. When you got down there, will you please tell me were you fingerprinted? A. Yes.

Q. And were you questioned? Yes or no?

Mr. Ruskin: Your Honor, I object to this as being irrelevant to the issues in this case.

The Court: Sustained.

Mr. Palmer: Exception.

I call upon the Government at this point to let me have the warrants for the arrest of Mrs. Diamant, [769] Samuel Diamant, Mr. Fisher, Mr. Popper and Mr. Carroll.

The Court: Well, I decline to ask the Government to produce those papers, on the ground that they are immaterial and irrelevant to the issues of this case.

Mr. Palmer: May I argue that point with you?

The Court: No. Go ahead.

Q. How long were you kept in that office on 90 Church Street on that day? A. I, personally?

Yetta Diamant—for Defendant—Direct

Q. Yes. A. I can't give you the exact time.

Q. About how long? A. About two to three hours.

Q. And about what time was your husband? A. Well, he was detained after I left.

Q. After you left? A. Yes.

Q. And was your husband questioned in your presence? Yes or no.

Mr. Ruskin: Your Honor, I object to these questions.

Q. Yes or no?

Mr. Ruskin: As being irrelevant.

The Court: Sustained.

[770] Mr. Palmer: Exception.

Q. Will you kindly tell me what was said to you and to your husband or anyone else in the premises at 47th Street before you went down in an automobile to 90 Church Street?

Mr. Ruskin: I object, your Honor.

The Court: Sustained.

Q. At any time before you took the witness stand today A. No.

Q. Now, the next time, the next day, were you in the Commissioner's office in this building? A. Yes.

Q. When the arraignment took place? A. Yes.

Mr. Palmer: That is all—pardon me. One other question.

Q. At any tim before you took the witness stand today and prior to September 28, 1951, the day of the arrest you told us about, and since that time, did any Government

agents ever come to your place and talk to you about whether or not Carroll had ever delivered or sold any gold and left gold in your place? Yes or no.

Mr. Ruskin: Your Honor, I object to this as being obviously improper.

The Court: Yes, sustained.

Mr. Palmer: Exception.

That is all.

* * *

[818] JOSEPH K. POLAK, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Palmer:

Q. Mr. Polak, are you connected with any bank? A. Yes, sir.

Q. What bank? A. First Pennsylvania Bank & Trust Company of Philadelphia.

Q. Has that bank any branches? A. Yes.

Q. Were you connected with that institution in 1951? A. Yes, sir.

Q. What is your title? A. Supervisor in the bookkeeping department.

[819] Q. Will you kindly tell me, in 1951, did that particular bank of yours have a branch known as the Kensington branch? A. Yes, sir.

Q. Where was that located? A. Kensington and Allegheny Avenue.

Q. Will you kindly tell me, in response to a subpeona, have you examined the records of your bank to find out whether or not in the years 1949, '50 or '51, whether your bank had an account with a man by the name of Frank Brooks, No. 712 Poplar Street, Philadelphia, Pennsylvania?

Joseph K. Polak—for Defendant—Direct

Mr. Ruskin: Your Honor, I object to this line of examination unless Mr. Palmer represents to the Court that he is going to connect any mention of this man's name with business done by an individual with Sheba Bracelets.

The Court: Yes. Can you connect this man with the address or the company involved here?

Mr. Palmer: I can connect the man with the address, which this gentleman from Philadelphia, who came here to say he didn't have such a person in that building, excepting there was a dentist there, I can connect him with 712 Poplar Street. Yes, I can. You [820] said "address." I will connect it with him.

Mr. Ruskin: Your Honor, I submit—

Mr. Palmer: Your Honor, I submit, if your Honor please, that in so far as this jury is concerned, there has been an effort made to—

The Court: Don't argue the evidence now. Let me reflect a little bit on what you just said.

I think the evidence is proper, Mr. Ruskin, on the representation that it can be connected either with the address or with Sheba Bracelets, and it would be relevant to meet issues and inferences which can be drawn from the Government's evidence in the case.

Mr. Ruskin: Your Honor, it would be my position that this evidence would be of no relevance whatsoever, unless somehow this name or this individual, who apparently the witness is prepared to testify about, had an account at this bank, in fact, was the same individual that—

The Court: Well, you can bring that out on cross-examination. But it seems to me that since you have already introduced evidence to the effect that the owner of this property is in the roofing business and who knew no one by that name at that address, there

are certain inferences that can be drawn from [821] that.

Now, the extent that this testimony can contradict or permit the drawing of different inferences, it seems to me that it is relevant.

Mr. Ruskin: Very well, your Honor. I would just submit, your Honor, that before it would become relevant the bank would have to have more than just the name in its files.

The Court: But you can bring out that it is only a name and then it is a question for the jury to weigh against all the other inferences in the case. But at this moment you are asking me to strike this out of the case on the ground that it is no proof at all, and on that ground I can't agree with you. I think that it is relevant. What weight it deserves is a matter for you to argue later.

Go ahead.

Mr. Palmer: Should I repeat the question?

The Court: I think you had better, yes.

Mr. Palmer: All right.

Q. Did you in the year 1949, 1950 or 1951, have an account in your bank with one Frank Brooks, of 712 Poplar Street, Philadelphia, Pennsylvania? Yes or no. A. Yes, sir; we had.

[822] Q. Would you kindly tell me, have you got the signature card here? A. Yes, sir.

Q. Is this the signature card which was kept in the regular course of conduct of the business of your bank? A. Yes, sir.

Q. Among others, with this man Frank Brooks? A. Yes, sir.

Mr. Palmer: I offer the signature card in evidence.

Mr. Ruskin: May I see it?

Joseph K. Polak—for Defendant—Direct

No objection.

(Marked Defendant's Exhibit O.)

Mr. Palmer: May I at this point, if your Honor please, with your permission, after you look at it, pass it to the jury?

The Court: Yes.

Mr. Palmer: Thank you.

(Exhibit shown to jury.)

The Court: All right, go ahead.

Q. In connection with this particular account of Frank Brooks, at any time before I subpoenaed your bank, I think the day before yesterday, to appear today, [823] at two o'clock, did any agents of the United States Government come to your bank, in any wise, shape, manner or form, or in any other—I am talking about any form, male or female—and inquire about Frank Brooks? A. Not that I know of, sir.

Q. In connection with this particular account, when was this account, if you please, started, what date, according to your records? A. September 22, 1949.

Q. And when did the account end, if it did? A. June 29, 1950.

Q. And how much was on deposit at that time, before it was withdrawn? A. You mean as a final balance?

Q. Yes. A. $198.24.

Q. Before that time what was the balance? A. Well, it had various balances during the period from September 22, '49, until the time it closed.

Q. What was the lowest and what was the highest? A. The lowest was $198.24, and the highest was $5,639.24.

Q. And have you the statement of that account [824] here? A. Yes, sir.

Mr. Palmer: I offer it in evidence.

Q. Was this a checking account? A. Yes, sir.

Q. And does your bank—I don't know—does your bank keep what some New York banks do, a machine which photographs the back and front of checks? A. Photostat them; yes, sir, we do.

Q. So you have the photostats? A. We can get them, possibly.

Q. So you have the photostats of the checks, back and front, from the time an account opens until it closed? A. That's right.

Q. Will you kindly tell me, was there any other address or any other name given by this, by Frank Brooks, to your bank when this particular bank was closed? A. Not that I know, sir.

Q. Was there anything in that account regarding a roofing company, anything in that record? A. I don't believe so. I think the signature card just has his position as salesman.

[825] Am I right?

Mr. Palmer: May I see the signature card, please?

Q. Now, this says on this card, Exhibit O, "Taken by R. V. Sandberg." Who is R. V. Sandberg? A. Well, he was an officer of the company at that time, but he is now dead.

Q. You mean of your bank? A. That is right.

Q. In connection with this particular account, when the account was closed, do you know whether the account was opened somewheres else? A. That I couldn't say.

Q. So far as your records are concerned, is there any record of Frank Brooks other than at 712 Poplar Street? A. That is the only Frank Brooks that we know of on our records.

Q. That was the Kensington branch? A. That's right.

Q. Now, I don't know Philadelphia, but before this jury, explain or answer this question: In connection with 712 Poplar Street, how far away from 712 Poplar Street was

this Kensington branch, if you know? [826] A. Oh, I would say it's about three or four miles; quite a distance.

Q. And about how many branches did your bank have in that year, 1949-1950? A. We had about twenty-one branches at that time.

Mr. Palmer: That is all. Your witness.

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[840] IRVING KIVOWITZ, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Mr. Palmer: Your Honor, in view of something your Honor said out of the presence of the jury, I don't want this witness to answer any questions until such time as you rule upon them, because I remember what you said and I am trying to find out whether or not I am within or without the pale. I think "the pale" would be the right word.

Direct examination by Mr. Palmer:

Q. What business are you in? A. We manufacture watch bracelets.

Q. How long have you been in that line of business? A. About twelve years.

Q. During that period of time or any of that period of time did you ever have a customer, the Sheba [841] Bracelets Company, Mr. Carroll? A. Yes, we did.

Q. I call your attention to this particular bracelet, Exhibit G, and ask you whether at any time you made bracelets—

Mr. Palmer: Mr. Ruskin is standing up so don't give me an answer until his Honor rules.

Mr. Ruskin: Finish your question.

Mr. Palmer: I want to be safe, so far as you are concerned, because between you and the Judge

I am more afraid of the Judge than I am of you.

Mr. Ruskin: Your Honor, I think that Mr. Palmer, in answer—

Mr. Palmer: Haven't I got a right to ask a question?

Mr. Ruskin: No, no, I don't think so, because we discussed in chambers this very matter.

Mr. Palmer: No, we did not.

Mr. Ruskin: Yes, we did. This is a transaction that took place, your Honor—

Mr. Palmer: Wait. I don't want him to testify.

Mr. Ruskin: I want Mr. Palmer to make a representation that the transactions this witness will [842] testify about fall within the period prescribed by your Honor in chambers.

The Court: All right. Now, I will give you my instructions all over again, because apparently you like me to do this in the presence of the jury, so I will have to accommodate you.

The only counts which are now before us and which are at issue in this case are the ones which are referred to in the indictment as substantive counts and relate to transactions which occurred in 1951, in September of 1951.

Now, unless these transactions have something to do with those dates, those transactions would be irrelevant, and I direct you not to bring witnesses here and put questions which have nothing to do with the issues before us.

Mr. Palmer: Pardon me, your Honor.

The Court: The date of 18th of September.

Mr. Palmer: In view of the fact, if your Honor please, that I don't agree—and I am sorry to say this in front of the jury, but you are big enough to know that when I say, that even lawyers and judges sometimes find that—you know what judges some-

times find—I contend, if your Honor please, that in connection [843] with that Count 2 and 10, on the subject matter that we were manufacturing jewelers, and that we did manufacture jewelry, I contend I have got a right to show to him and any other witness that we did manufacture jewelry, and irrespective of the date.

The Court: On or about September, 1951. You are not going to take up our time by telling us what anybody did in 1949 and 1950. The violation of law which is charged is a violation involving the improper use of the end use certificates on two occasions, in September, 1951, and I have already told you that that is what I was going to charge the jury.

Now, what occurred before that has no bearing upon the issues here, unless you can relate it to the time before the transactions which are the subject matter of the substantive counts.

Mr. Palmer: All I want to say is I disagree with you.

The Court: Mr. Palmer, you may disagree with me, and it is your privilege to disagree with me, but you have already taken your exceptions to all my rulings, and as I understand it you have properly protected your client's rights. I see no reason why you want to elicit from this witness a matter which I have already [844] ruled is out of the issues of this case.

Mr. Palmer: Can't I show through him or any other witness that we were in the jewelry business prior to 1951?

The Court: Put your question and I will rule on it. It sounds to me like a form of judicial entrapment. You make a statement and then place me into a position where I am drawn into an argument with you.

Mr. Palmer: I don't want any argument with you. After all, you have got the last word and I am only here listening to you, your Honor. You have got the last word.

The Court: I try to have the last word, but I haven't succeeded.

Mr. Palmer: All right.

By Mr. Palmer:

Q. Now, will you kindly tell me, in the year 1949 did you manufacture any bracelets? Don't answer the question, because his Honor is looking at me.

The Court: Let Mr. Palmer finish the question.

Q. Did you manufacture any bracelets in your factory in Paterson, New Jersey, for the Sheba Bracelet Company? Yes or no.

[845] Mr. Ruskin: I object.

The Court: Yes, sustained, on the ground that is completely irrelevant and not within the purview of the substantive counts which are now in issue in the case.

Mr. Palmer: All right. Then there is nothing further to be said. I won't even take exception, because your Honor reminded me of the fact that I don't have to take one here.

All right, that is all.

The Court: Who is your next witness?

(Witness excused.)

Mr. Palmer: In view of your Honor's ruling and what your Honor has said, I desire to withdraw from this case the following exhibits, and I desire to have these particular exhibits, if your Honor please, re-established only so far as the record is concerned by the mark "For Identification."

The Court: Are those all the bracelets? You are taking them out of the case?

Mr. Palmer: In other words, I am taking, if your Honor please, not the bracelets out of the case. I am taking these exhibits, because of your rulings, which I do respect, and you know I say that—I ask [846] that Exhibits N, Exhibit L, Exhibit M, Exhibit J—no, J is marked for identification; K is for identification—Exhibit I, Exhibit H, be withdrawn as exhibits and ask that they be marked simply for identification.

The Court: Well, I will grant the motion, but as I already told you, I will permit Mr. Ruskin to comment on the fact that when you offered these in evidence you represented that they would be connected with the issues in the case, and I permitted you to ask questions of Mr. Kertez, as an expert, based upon your representation that there would be connecting evidence, and now I take it that in taking all of this jewelry, which has been shown to the jury, out of the case, you are withdrawing that representation.

Mr. Palmer: Pardon me. I say at the present moment that by reason of the rulings which the Court has made, that I, as an attorney for the defendant, believing that the rulings are something which I can't do anything about, any more than, as you said before, have my exception, that since I cannot close the case up in the particular fashion I desire to, I don't care comment is being made about my connecting or not, and I say, so far as that is concerned, it is immaterial as [847] far as the case is concerned, based upon your rulings, whether I have these things in evidence or I haven't got them in evidence.

The Court: All right. Just so we clearly understand each other, I will direct the Clerk to mark all of these

exhibits, which appear to be all of the jewelry that has been brought into the case by you, marked for identification, and remove them as exhibits in the case, and I instruct the jury that they are not in evidence and they must not consider them to be evidence in this case, but I will permit Mr. Ruskin to make any proper comment that he may wish to make on summation with respect to the representation which you made.

Mr. Palmer: Your Honor, I have no objection to that, and I suppose I also have my right to make what I consider comments that are proper in connection with the same thing.

The Court: Sure you will, and you may certainly have that right.

Mr. Ruskin: Your Honor, in view of Mr. Palmer's motion, I at this time would like to move to strike out all of Mr. Kertez's testimony concerning these exhibits.

[848] Mr. Palmer: I consent, if your Honor please, excepting as to his testimony concerning Exhibit G, which has been marked in evidence, because he made Exhibit G.

The Court: When did he make it?

Mr. Ruskin: 1949.

The Court: Yes. Well, now, that is—

Mr. Palmer: Pardon me.

The Court: That is just as irrelevant as the proposed testimony of this witness who just left the stand.

Mr. Palmer: This was marked in evidence by consent of the Government, and so far as that is concerned I submit that there is a difference at the present moment between my withdrawing these exhibits because of the rulings the Court has made, and because I believe that it is in the best interests of my client to protect the record, and as far as this was concerned, if your Honor please, this was marked in evidence through Mr. Kertez, and there was no objection made at the time, and this was Mr. Kertez's own work, and therefore, at this time to withdraw it—

Colloquy

The Court: Mr. Palmer, you have just been allowed to withdraw exhibits from the case, and Mr. [849] Ruskin has called my attention to the fact that that exhibit is in this case only because at that iime the date 1949 may have been relevant. It is no longer relevant.

We are concerned with two counts, two transactions in 1951, and those two only, and under those circumstances, it seems to me that there is no reason why this jury or the issues of this case should be burdened by an exhibit which should have no bearing upon the case.

Mr. Palmer: I agree with the Court, because I claim, so far as that is concerned, we did manufacture jewelry. But that goes to the question of Exhibit 2 and 10, as to whether we were manufacturing jewelers, and in so far as this is concerned, this particular exhibit went into evidence as being manufactured by Mr. Kertez, among other things, and he came in as an expert.

The Court: What date, Mr. Palmer?

Mr. Ruskin: October 5th and 6th, I think, your Honor, October 5th and 6th, 1949.

Mr. Palmer: This exhibit came into court with no objection on September 13, 1956.

The Court: Yes, that is the $608.05 labor and manufacturing charge, October, 1949. It is irrelevant [850] and it will be stricken from the record and the jury is instructed to disregard it.

Mr. Palmer: Then, if your Honor please, to that you will remember upon the record—

The Court: I will ask the Clerk to re-mark that as an exhibit for identification.

Mr. Palmer: Well, then, your Honor understands that in connection with this exhibit, that this is in a different class than anything else, because this was brought into existence through the medium of the mouth of the man who made it.

The Court: Yes, I concede that. My recollection is that what he testified to is that he made it, he made it for Sheba Bracelets.

Mr. Palmer: That's right.

The Court: But he got paid $608 and some cents, but he made it in 1949.

Mr. Palmer: That's right.

The Court: Two years before the transactions with which we are concerned in this case, and for that reason I am striking it out of the case. It is no longer relevant and can have no possible bearing unless you connect it up with anything that happened in the indictment period, that is, September, 1951, and [851] you are not doing that.

Mr. Palmer: Your Honor, then may I at this time again—and I always have the last word—may I again remind you of the fact that in so far as withdrawing these other exhibits is concerned, that I claim it has absolutely nothing to do with the question of the one that has been marked in evidence, but your Honor has ruled differently, and under the circumstances, I have to stand by and—

The Court: "Nothing to do with the ones that have been marked in evidence." I don't know what you are talking about, Mr. Palmer. The ones that were marked were not marked in evidence except under your representation that they would be connected. You are now withdrawing them from the evidence and withdrawing your representation.

Mr. Palmer: Because—

The Court: I don't see why you are comparing this to those at all.

Mr. Palmer: Because in the one case, if your Honor please, Mr. Kertez was put on the stand, over the objection of Mr. Ruskin, as an expert in casting, which he didn't do. He made it, but the other one he made himself, and that goes to the question [852] of—

The Court: In 1949?

Mr. Palmer: What difference does it make? So far as I am concerned, once a jeweler, always a jeweler.

The Court: Oh, no.

Mr. Palmer: All right, that is my contention.

The Court: Mr. Palmer, there is no use. I just can't communicate with you any more.

Mr. Palmer: All right.

The Court: What else have you got?

Mr. Palmer: Based upon your Honor's rulings—

The Court: I know, it is all based on the rulings.

Mr. Palmer: Of course, your rulings.

I rest.

The Court: All right.

Any further evidence in the case?

Mr. Ruskin: No, sir.

The Court: Then both sides rest.

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GOVERNMENT'S REQUESTS TO CHARGE

[974] The Government respectfully requests the Court to charge as follows:

1. Elements of Crime under 18 USC, Section 1001:

In order to find the defendants Robert J. Carroll and Sheba Bracelets, Inc. guilty on Counts 2, 3, 10 and 11 of the indictment, you must find first, that the "end use certificate for semi-processed gold" referred to in each of said counts contained false statements; second, that the certification of said certificate was made in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department; and third, that the false statements were made knowingly and wilfully, which means intentionally, with knowledge of its falsity.

Government's Requests to Charge

2. Materiality under 18 U. S. C. Section 1001:

If there is any requirement in the law of proof that the false statement was material to the work of the Director of the Mint, I charge you that as a matter of law the certification was material.

[975] 3. No Necessity of Proving Corrupt Motive in Submitting False Statement:

Whether or not the defendant ultimately intended to cheat the Government by submitting the certification is immaterial. The crime is complete upon submission to a Government agency of a false statement knowing it to be false.

> "* * * It does not lie with one knowingly making false statements with intent to mislead the (Government agency) to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead * * *."

4. No excuse for False Statement.

The law recognizes no excuses or justification for a false, fictitious and fraudulent statement wilfully made in a document submitted to the Office of the Director of the Mint.

5. Responsibility of Corporate Officers.

The fact that the defendant Robert J. Carroll signed the "end use certificates for semi-processed gold" as president of Sheba Bracelets, Inc., [976] the corporate defendant, does not absolve him of personal criminal responsibility, if you find that the proof as to him otherwise satisfies the requirements I have indicated.

Defendants' Requests to Charge

The fact that the defendant corporation, Sheba Bracelets, Inc., may or may not also be liable, does not absolve its agent who makes a false statement, even though at the time of the making of the statement he is acting in a representative capacity. Corporate agents may be criminally liable individually for acts done ostensibly in behalf of the corporation.

Where a man personally controls a corporation and governs the conduct of a business, he is personally liable for crimes committed through his acts. The mere existence of a corporation under which the person operates does not protect him.

DEFENDANTS' REQUESTS TO CHARGE

[977] 1. Indictment: An indictment is nothing more or less than an accusation in writing. It is the instrumentality whereby a criminal action is instituted. The fact that a grand jury has returned an indictment against a man is not to be considered as evidence of the man's guilt. On the contrary, the defendant is presumed to be innocent of the accusations alleged against him in the indictment and you are hereby charged, as a matter of law, that it is your duty to presume the defendant to be innocent of the charge made against him unless and until you are satisfied of his guilt by the evidence adduced in support of the indictment, beyond a reasonable doubt.

2. Presumption of Innocence: Every person charged with a criminal act by law is presumed to be innocent of that charge and throughout your deliberations, and until such time as you are convinced, beyond a reasonable doubt to the contrary, the defendants are entitled to this presumption of innocence.

3. This presumption of innocence, under the American system of jurisprudence, is a substantial part of our law

and follows the defendant not only when the indictment is returned, but stays with the [978] defendant throughout the entire case, and must not be cast aside by the jury through passion or prejudice. This presumption of innocence, which clothes every person accused of crime, imposes upon the Government the burden of establishing the guilt of a person accused not by a mere preponderance of evidence, as in civil cases, but beyond a reasonable doubt. You are required, therefore, to give careful and weighty consideration to the presumption that the defendant here on trial is innocent of the accusations made by the Government against him and if, after a consideration of the evidence in this case, you have any reasonble doubt as to the guilt of the defendant, it is your duty to acquit him. You must exercise the utmost caution and care in considering the evidence here, lest you unjustly convict an innocent man.

4. Burden of Proof: The burden of proof is on the prosecution. The prosecution has the burden of establishing every fact and circumstance essential to the guilt of the accused. Each fact and each circumstance must be proved beyond a reasonable doubt before a verdict of guilty can be arrived at.

[979] 5. If the Government fails to establish each and every fact material and essential to the guilt of the accused, either because there is no testimony supporting such element, or because the testimony in support thereof does not satisfy you beyond all reasonable doubt of the truth, then it is your duty to acquit the accused for the reason that the Government has failed to establish his guilt. The burden on the part of the Government to prove every element of the crime charged, beyond a reasonable doubt, never shifts but always remains with the Government throughout the trial.

6. The law does not require, and the defendant is not called upon to prove that he is innocent of the accusations made against him, as his innocence is conclusively presumed, until the contrary is established beyond a reasonable doubt.

7. You must bear in mind that the law does not require a defendant in a criminal case to prove himself innocent of the charge made against him by the Government and that the Government has the burden of proving the defendant guilty, beyond a reasonable doubt, in the manner and form charged in the indictment, to the satisfaction of the jury, and unless the [980] prosecution has done so, it is the duty of the jury to find the defendant not guilty and to acquit him of the charge made in the indictment.

8. Reasonable Doubt: The term "reasonable doubt" means a doubt of such quality which, were it to arise in your private lives in connection with some important decision required to be made by you, would cause you to pause, hesitate and ponder in that decision. So, if when all the facts in evidence in this case have been considered by you, and you are not abidingly persuaded and convinced, to a moral certainty in your conscience, that the defendant is guilty, you have a reasonable doubt.

9. You are instructed that a reasonable doubt exists if after an impartial comparison and consideration of all the evidence you cannot truthfully say that you have an abiding conviction of the defendant's guilt, a conviction to a moral certainty. And in this connection you are further instructed that it is not sufficient for the Government to establish a probability, even though a strong one, that the defendant is guilty. The evidence must establish the guilt of the defendant to a moral certainty; it must satisfy your judg-

ment as to his guilt [981] so as to exclude any other reasonable theory consistent with the defendant's innocence, you must do so and find the defendant not guilty.

10. After a consideration of the evidence in this case, if you feel that the facts established by the Government are as consistent with innocence as they are with guilt, it is your duty to render a verdict of not guilty and acquit this defendant, for you may not base a verdict of guilty upon the evidence in this case unless the facts proven by the prosecution exclude, to your complete satisfaction, every other hypothesis but that of guilt.

11. Where the facts or circumstances proven by the Government are susceptible of two inferences, one pointing to innocence and the other pointing to guilt, it is your duty to adopt the inference pointing to innocence, even though the inference pointing to guilt may be equally weighty.

12. You are charged, as a matter of law, upon the evidence in this case, that unless the hypothesis of guilt flows freely and naturally from the facts proven and unless all such facts are consistent only with guilt, such evidence does not warrant a conviction and if the evidence in this case is reconsilable [982] with the conclusion of innocence, as well as a conclusion of guilt in your minds, I direct you, as a matter of law, that it is your duty to reconcile the facts with innocence, and you must therefore find the defendant not guilty of the crime charged and acquit the defendant.

13. In considering the evidence offered by the Government in this case, you must always bear in mind that the Government has the duty of establishing each fact and each circumstance essential to the commission of the crime of which the defendant is accused, beyond any reasonable doubt.

14. So, if in your opinion, the evidence introduced by the prosecution is only sufficient to raise a conjecture or a suspicion unfavorable to the accused, it is not such evidence as would justify you in rendering a verdict of guilty, and it is your duty under such circumstances, which I charge you, as a matter of law, to acquit the defendant.

15. Weighing the Evidence: I charge you, as a matter of law, that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is your duty to find the defendant not guilty of the charge here made, and you must [983] accordingly acquit the defendant.

16. In determining the credibility of the witnesses who have testified at this trial, you must not allow yourselves to be persuaded to credence than other witnesses, and if you believe that any witness who has testified at this trial has testified falsely, in any phase of his examination, whether on direct examination by the Government or on cross-examination conducted at the instance of the defendants' counsel, you are authorized, and it is your privilege, to reject all of the testimony of such a witness.

17. You are not to be persuaded in your consideration of the evidence in this case by the fact that the Government of the United States is a party to this action, and I charge you, as a matter of law, that the Government is to be considered as any other party, and its counsel as any other counsel for any other party.

18. In your deliberation, you must adhere strictly to the following rules, which I charge you upon your oaths, as a matter of law:

[984] (a) You must consider only the evidence in this case;

(b) You are to disregard answers of witnesses which the Court has directed to be stricken out at any stage of the trial;

(c) You must disregard all arguments of counsel, addressed to the Court, upon questions of law, or upon motions for the admission or exclusion of evidence, as well as the rulings of the Court upon such matters, whether in favor of the Government or in favor of the defendant;

(d) You must disregard any suggestion which may have been conveyed in your mind by any question which was not allowed, as well as any suggestions which may have been conveyed to your minds by things not in evidence;

(e) You are not to construe the denial by the Court of any motions made to dismiss this indictment, as such a ruling is not to be considered by you as any indication of the guilt or innocence of the defendant;

(f) You must not be influenced by anything which the Court has said or done, which may have given you an impression as to any opinion entertained [985] by the Court upon the facts, as you are the sole judges of the facts to the precise extent that the Court is the judge of the law;

(g) You must not indulge in speculation, nor pursue possibilities or probabilities, as you are required upon your oaths to render a decision, solely upon the evidence;

(h) You must render a verdict representing your real opinion and judgment;

(i) While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has

the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants for the purpose of preventing a disagreement or arriving at a compromise;

(j) In your consideration of the evidence in this case, you must always bear in mind the fact that you are justified in assuming that the defendant is innocent of the crime imputed to such defendant by charges contained in the indictment, and until [986] the Government has convinced you, beyond any reasonable doubt, of the guilt of the defendant, you, and each of you, must continue to regard the defendant as innocent of the crime of which the defendant is charged;

(k) I charge you, as a matter of law, that you must not permit atmosphere to displace evidence, and that you must not permit passion and prejudice to enter into your consideration of the evidence in this case;

(l) I admonish you, upon your oaths, to be ever vigilant to reject innuendoes which may have been conveyed to you, during the trial of this case, and to decide the same honestly and justly, according to your oath, and to render a true and just verdict, according to your conscience.

19. I instruct you that the offense charged in the remaining counts two, three, ten and eleven, consists of an alleged violation of Section 1001 of Title 18 of the United States Code, which reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals [987] or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to con-

tain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisonment not more than five years, or both."

20. I instruct you that before you can convict the defendants on either of the remaining counts you must find, beyond a reasonable doubt, that the defendants, in a matter within the jurisdiction of a department or agency of the United States, knowingly and wilfully falsified, concealed or covered up, by trick, scheme or device, a material fact, or made false, fictitious or fraudulent statements or representations, or made or used any false writing or document, knowing that the same contained a false, fictitious or fraudulent statement or entry.

21. I instruct you that unless you find, beyond a reasonable doubt, that the statements and representations made by the defendants in the "End Use Certificates for Semi-Processed Gold," referred to in the indictment, were either false or fictitious [988] or fraudulent, you must bring in a verdict of not guilty on the four remaining counts.

22. In this connection, I charge you, as a matter of law, that fraud is never presumed. On the contrary, the presumption in law is that parties in their business relations are prompted by honest motives and this presumption is so well established in law that before you are justified in abandoning that theory of the conduct of the defendants in this case you must be satisfied, beyond a reasonable doubt, and not by mere conjecture or suspicion, that the defendants intentionally, wilfully and knowingly embarked upon a course of dealings with fraudulent purpose and intent.

23. I further instruct you that fraud consists of a false representation of a material fact made with knowl-

edge of its falsity and with intent to deceive the party to whom such representation is made.

24. Unless you find, therefore, beyond a reasonable doubt, that the defendants made false representations of a material fact, with knowledge of its falsity and with intent to deceive the Government, you must bring in a verdict of not guilty on the remaining counts of the indictment.

[989] 25. I instruct you that the burden is on the Government to prove that the defendants made false, fictitious or fraudulent statements or representations, or that they knowingly and wilfully falsified, concealed or covered up, by any trick, scheme or device, a material fact, and unless you so find beyond a reasonable doubt you must bring in a verdict of not guilty on the remaining counts of the indictment.

26. The law does not require, and the defendants are not called upon to prove that they did not commit the acts as charged in the remaining counts of the indictment. The burden is on the Government to prove, beyond a reasonable doubt, that the remaining acts charged in the indictment were committed by the defendants knowingly and wilfully.

27. In this connection I instruct you that the mere signing of the statements contained in the "End-Use Certificates for Semi-Processed Gold," referred to in the indictment, is not a crime and that the defendants must have known them to be untrue and must have signed them to accomplish the unlawful act.

28. I hereby instruct you that the intent of the defendants is the crucial element of the crime as charged and unless you find, beyond a reasonable doubt [990] that

the defendants intended to commit the crimes as charged in the remaining counts of the indictment you must bring in a verdict of not guilty on said counts.

29. I instruct you that in order to find the defendants guilty on either of the remaining counts of the indictment you must find, beyond a reasonable doubt, that they knew of the alleged falsity of the statements as referred to in the indictment and that they knowingly used the said statements in order to defraud the Government.

30. I instruct you that unless you find that the acts complained of in the indictment were committed in connection with any matter within the jurisdiction of any department of agency of the United States, beyond a reasonable doubt, you must bring in a verdict of not guilty on the remaining counts of the indictment.

31. In this connection I instruct you that in order to find that the statements complained of in the indictment were made in a matter within the jurisdiction of a department of agency of the United States, you must find that those statements impeded the exercise of Federal authority.

[991] 32. I hereby instruct you that unless you find, beyond a reasonable doubt, that any statements made by the defendants impeded the authority of the Federal Government you must bring in a verdict of not guilty upon the remaining counts of the indictment.

33. At the beginning of the trial the indictment consisted of five counts charging the defendant, in Count One, with conspiracy, and in the remaining counts with violations of Section 1001 of Title 18 of the United States Code in different forms. The Court granted the defendants' motion to dismiss Count One of said indictment and denied the defendants' motion to dismiss Counts Two, Three, Ten

and Eleven of the indictment. I hereby charge you that the denial of the motion to dismiss the remaining counts was the Court's ruling upon a proposition of law and that such ruling should not influence you in the slightest degree in determining the guilt or innocence of the defendants. You have to determine the guilt or innocence of the charges set forth in these remaining counts as if no other counts in the indictment were alleged, so that the Court's refusal to dismiss the remaining counts is no indication that the Court has any opinion as to [992] whether these defendants are guilty or innocent.

34. Counts Two and Ten of the indictment charge the defendants Sheba Bracelets, Inc., and Robert J. Carroll, in substance, with having unlawfully, knowingly and wilfully, on September 14, 1951 and September 28, 1951, respectively, made false, fictitious and fraudulent statements and representations on "End-Use Certificates for Semi-Processed Gold"; said statements and representations being to the effect that the industry, profession or art in which the defendants were regularly engaged required the use of said gold referred to in the said certificates was manufacturing jewelry, whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged was not manufacturing jewelry. Said Counts Two and Ten are based on item "6." of said "End-Use Certificates for Semi-Processed Gold," which reads as follows:

"That the industry, profession or art, requiring the use of gold, in which he is regularly engaged, is as follows:" which the defendants completed by inserting the words "manufacturing jeweler." I charge you that unless you find that the Government [993] has proved, beyond a reasonable doubt, that the defendant Sheba Bracelets, Inc., was not "manufacturing" jewelry it is your duty to bring in a verdict of not guilty.

Defendants' Requests to Charge

35. In this connection I charge you that it is not the duty of the defendants to prove that they did manufacture jewelry but the Government has the burden, throughout, to prove that the defendant Sheba Bracelets, Inc., was not in the business of manufacturing jewelry.

36. I charge you that if you find that the defendant Sheba Bracelets, Inc. did manufacture jewelry in 1949 the law presumes that the said defendant continued such manufacturing until the reverse is proven.

37. I therefore charge you that unless you find that the Government has proven, beyond a reasonable doubt, that the defendant Sheba Bracelets, Inc. had entirely ceased the manufacturing of jewelry in September, 1951, you must bring in a verdict of not guilty.

38. In this connection I call your attention to the fact that the defendants, in their certificates, did not state that they were constantly [994] engaged as manufacturing jewelers but only that they were "regularly" engaged as manufacturing jewelers. Therefore, even if you accept the testimony of the Government to the effect that the equipment of the defendant Sheba Bracelets, Inc. was "dusty," this is not proof that said machinery could not have been used for regularly manufacturing jewelry, and you still have to bring in a verdict of not guilty unless you find that the Government has proven, beyond a reasonable doubt, that the defendants were not regularly manufacturing jewelry.

39. Counts Three and Eleven charge the defendants, in substance, with having, on September 14, 1951 and September 28, 1951, respectively, unlawfully, knowingly and wilfully making false and fictitious and fraudulent statements and representations on the "End-Use Certificates for

Semi-Processed Gold;" said statements and representations being to the effect that certain gold which was sold to Sheba Bracelets, Inc. would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged whereas, in truth and in fact, the gold so acquired was not to be used by the Sheba Bracelets, Inc. in the industry, profession or art [995] in which it was regularly engaged. Said counts are based on that part of item "9." of said certificates which reads as follows: "That the gold sold to him as a result of the representations made in this certificate will be (Check one, or more if applicable): Used by him in the industry, profession or art in which he is regularly engaged; or * * *." I charge you that unless you find that the defendants placed a check, or other indication, in the space provided therefor there is, as a matter of law, no statement or representation in existence as referred to in said Counts Three and Eleven and it is your duty to bring in a verdict of not guilty.

40. I further charge you that the Government has the burden to prove, beyond a reasonable doubt, that at the time when the said certificates were signed, to wit, on September 14, 1951 and September 28, 1951, respectively, the defendant Carroll did not have the intention to use the gold so acquired by him in the industry, profession or art in which the defendants were regularly engaged.

41. I therefore charge you that unless you find that the Government has proven, beyond a reasonable doubt, that the defendant Carroll did not have [996] the intention, on September 14, 1951 and September 28, 1951, to use said gold in the industry, profession or art in which the defendants were regularly engaged, it is your duty to bring in a verdict of not guilty.

42. I further charge you that it is not the duty of the defendants to prove that they had the intention to use the

gold for the purposes above referred to but that the Government has the burden of proof throughout that the defendants, on the dates as aforesaid, did not have the intention to make such use of the gold.

43. In this connection I charge you, as a matter of law, that it is entirely immaterial what the defendants did with the gold so purchased after September 14, 1951 and September 28, 1951, the gravamen of the charge being that at the time when the defendants signed the certificates they did not intend to use the gold for the purposes referred to.

44. I charge you, as a matter of law, that those representations, in order to constitute fraud, must relate to some material past or existing fact and not to mere promises or statements of intention; that no statement as to what will be done, or is intended to be done, in the future constitutes fraud; [997] and that fraud may not be predicated upon the mere non-performance of a promise.

45. Moreover, I charge you, as a matter of law, that the Government has not proven, beyond a reasonable doubt, that the defendants sold the gold obtained by them under the certificates dated September 14, 1951 and September 28, 1951, respectively, in an unmanufactured condition or that the defendants used said gold in any other manner than in the industry, profession or art in which they were regularly engaged.

46. I charge you that, in any event, it is the burden of the Government to prove, beyond a reasonable doubt, that the defendants sold or otherwise disposed of the gold obtained by them under the certificates dated September 14, 1951 and September 28, 1951, respectively, other than for the purposes above referred to and that it is not the

duty of the defendants to prove that they did use the gold for such purposes.

47. I hereby instruct you that if you find that the defendants are not guilty of the charge set forth in Counts Two and Ten of the indictment you must, necessarily, bring in a verdict of not guilty [998] in connection with the charge set forth in Counts Three and Eleven of the indictment.

48. I further charge you that if you find that the defendants are not guilty of the charge set forth in Counts Three and Eleven of the indictment, you must necessarily bring in a verdict of not guilty in connection with the charge set forth in Counts Two and Ten of the indictment.

49. I charge you that the fact that the defendant Robert J. Carroll did not take the stand cannot in any wise be charged or urged against the defendants Sheba Bracelets, Inc. and Carroll, and you are to draw no inference whatever from the fact that said Carroll has not taken the stand in this case.

50. I charge you, as a matter of law, that the defendants are entitled to rely upon the judgment of their counsel that the Government has made out no case calling for any explanation or testimony on the part of said defendants, or in the alternative, the judgment of their counsel that such explanation as has already been furnished in answer to the questions propounded to the other witnesses and now in evidence obviated the [999] necessity of the giving of further testimony by the defendant Carroll.

51. You must bear in mind that the law does not require a defendant in a criminal case to prove himself innocent

of the charge made against him by the Government and that the Government has the burden of proving the defendants guilty, beyond a reasonable doubt, in the manner and form charged in the indictment, to the satisfaction of the jury, and unless the prosecution has done so, it is the duty of the jury to find the defendants not guilty and to acquit them of the charge made in the indictment.

Charge of the Court

(PALMIERI, J.-

[1000] The Court: Ladies and gentlemen of the jury: Before instructing you on the law in this case I want to thank you for your attention to the evidence, your prompt attendance at the sessions of the court and the manner in which you have discharged your functions in this case up to this point. I am sure that I express the thanks of the lawyers as well, and you can be sure that in discharging this extremely important function as the sole triers of the facts in this litigated controversy you are an essential and important arm of the administration of justice.

If, during the course of the trial, there have been rulings on the law or exchanges between the lawyers and myself, disregard them; they are not part of your function. I have the responsibility for making the rulings on the law. Yours is the responsibility for deciding the facts and deciding where the truth lies in the controverted area. You must not get those functions mixed up, and you should not take with you any impression either of the personality of the lawyers or of my own. We will have substantially completed our duties when you retire to the jury room.

[1001] If, in the course of my charge, I refer to any facts, please don't think that by guile or by subtlety I am trying to induce you to believe the facts, or that I have an

opinion which I am trying to inflict upon you. I have great respect for jury verdicts. The law consigns to you the stupendous function of finding the facts without reservation, subject only to the duty which you were sworn to at the outset of accepting the law as I charge it. I don't wish in any way to impinge upon that function. I respect it. I want to leave it completely untrammeled.

My duty is to instruct you as to the law. Your duty is to accept the law as I state it to you, to apply it to the facts as you may find them, and then to render a fair and a just verdict solely on the evidence and in accordance with the instructions that I give you.

There are two defendants on trial and there are two defendants with respect to whom you will have to return a verdict. One is a corporation, Sheba Bracelets, Inc., and the other is an individual, Robert J. Carroll. The corporation, as well as an individual, may be held liable for a violation of law. When officers or agents or employees of the corporation, [1002] acting within the scope of their duties, commit acts which transgress the law, the corporation may be held criminally liable.

These defendants are each charged with four specific violations of law. They are violations of statutes of the United States and relate here to dealings in gold. Each alleged offense is set forth in a separate count of the indictment.

I have told you before that an indictment doesn't prove anything. It is a legal device whereby issues in a criminal case are brought to trial. It is a piece of paper, an important piece of paper, but merely a piece of paper and you should not feel and you must not believe that the mere making of the charge constitutes proof of anything. But from the standpoint of delineating the issues in the case, I think it might be helpful if I explained briefly what this charge is before I get to other elements which you must understand and consider.

Charge of the Court

You are concerned with Counts 2 and 3 and Counts 10 and 11. 2 and 10, as well as 3 and 11, refer to the use of the end use certificates, about which you have heard so much in this case. In substance, each one of these counts says that the two [1003] defendants misused the end use certificates by tendering them with the knowledge that they contained a false statement. One false statement was that Sheba Bracelets was engaged in the business of manufacturing jewelry. I stress the two words, "manufacturing jewelry." The other false statement charged was that the gold so purchased would be used in the business in which Sheba Bracelets was regularly engaged.

The manufacturing jewelry counts, if we can refer to them in that sense, are Counts 2 and 10, and the false statement, with respect to the use of gold in the business in which the purchaser was regularly engaged, are Counts 3 and 11. In other words, except for the dates these counts are substantially similar. There are two transactions. One transaction took place on September 14, 1951. The other transaction took place on September 28, 1951. End use certificates were used in both transactions, or so the proof would indicate. When I say they were used, I am not usurping your functions. What I mean to say is the proof would justify you in coming to the conclusion that end use certificates were used. They have been offered in evidence here by the Government, and it charges that on each occasion in the use of these end use certificates the [1004] defendants made two false statements on each occasion, the false statement that Sheba Bracelets was engaged in manufacturing jewelry and the false statement that the gold so purchased would be used in the industry, profession or art in which it was regularly engaged; and it is up to you to decide when those statements were made, whether they were false when they were made, whether the defendants, or either of them, knew them to be false, and only then can you arrive at the conclusion that the law was violated.

Charge of the Court

Let me read just one count having to do with the 14th of September transaction and one count having to do with the 28th of September transaction. Count 2 says:

> "On or about the 14th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an 'End Use Certificate For [1005] Semi-Processed Gold,' such statement and representation being to the effect that the industry, profession or art in which the defendants were regularly engaged, requiring the use of said gold referred to in the aforesaid certificate was 'manufacturing jewelry'; whereas in truth and in fact, as the defendants then and there well knew, the industry, profession or art in which they were regularly engaged, requiring the use of such gold was not 'manufacturing jewelry.'"

And then they cite the statute, Title 18, Section 1001, United States Code, and I will read from that in a moment.

The third count, that relates to the September 14th transaction, too, is substantially in the same language, except that it refers to the other statement which it charges was false.

The tenth count, and the eleventh count refer to the September 28, 1951 transaction. The tenth count is substantially the same as the count which I just read to you, the only difference being that the alleged false statement with respect to "manufacturing jewelry" is made on the 28th of September instead of the 14th of September.

[1006] Now, I will read to you from the eleventh count. That is a prototype of the third count. The eleventh count, as I said, has to do with September 28, 1951, and it refers to the other false statement claimed to have been made at that time, and it says:

> "On or about the 28th day of September, 1951, in the Southern District of New York, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, who was then and there the treasurer of said corporation, the defendants herein, in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make a false, fictitious and fraudulent statement and representation in an 'End Use Certificate For Semi-Processed Gold,' such statement and representation being to the effect that certain gold which was sold to Sheba Bracelets, Inc., defendant herein, as the result of a representation made in such certificate, would be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged; whereas in truth and in fact, as the defendant Robert J. Carroll then and there well knew, the said gold so acquired was not [1007] to be used by Sheba Bracelets, Inc. in the industry, profession or art in which it was regularly engaged."

The law pursuant to which these four counts were drawn states the following, and I am reading from Section 1001, Title 18, of the United States Code. The heading is:

> "Statements or entries generally," and here is the text:
>
> "Whoever, in any matter within the jurisdiction of any department or agency of the United States,

knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact or makes any false, fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be"—and then there is a definition of the penalty.

As you were told at the outset of the case, the right to deal in gold was circumscribed by statute very early in the administration of President Roosevelt. I think it was 1934 that the gold bullion law was passed, and that law empowered the President to make certain orders, Executive Orders, under his authority, pursuant [1008] to the statutory provisions, and certain regulatory powers were conferred upon the Treasury Department. The result of this law, these regulations, these Presidential orders, was in substance that individuals could not deal in gold freely. The only way they could deal in gold was to comply with the regulations and with the law as they were administered by the agencies of the United States Government. I charge you as a matter of law that the obtaining of the licenses, which you have heard about in this case, the obtaining of the end use certificates, the filing of end use certificates with the refiners, as was done here, all of that was within the jurisdiction of the Treasury Department, and in particular, within the jurisdiction of the Director of the Mint, so that you need not be concerned with those parts of the law that I just read to you, about being within the jurisdiction of any department or agency of the United States. It was, and I charge you as a matter of law that the transactions were within the jurisdiction of the Director of the Mint.

Charge of the Court

The burden is on the Government to prove such defendant guilty beyond a reasonable doubt. That is the basic rule in our criminal cases. Reasonable doubt [1009] is a doubt founded on reason. It is a doubt that is arguable. It almost defines itself. If, after a fair and impartial consideration of all of the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendants and that you do not have an abiding conviction of the defendants' guilt, which amounts to a moral certainty, then you have a reasonable doubt, and if you do it is your duty to acquit.

If, however, after such an impartial and fair consideration of all the evidence of the case you can candidly and honestly say that you have an abiding conviction of the defendants' guilt, which amounts to a moral certainty, such a conviction as you would be willing to act upon in important, weighty personal problems, then you have no reasonable doubt and under those circumstances it is your duty to convict.

Putting it perhaps more simply and plainly, if you were confronted with an important decision and after reviewing all of the factors that were pertinent you were beset by doubts and uncertainty, then you would have a reasonable doubt. Conversely, if you had no uncertainty and you felt sure of your judgment, [1010] then you have no reasonable doubt.

A great many pieces of information have been introduced in this trial. I want to stress the fact that the extent to which proof is credible is entirely up to you, just as is the weight you wish to give to any particular item of proof. A great many pieces of information have been introduced in this trial. People have testified as to what they have seen and done and a number of documents have been shown to you or described to you. These pieces of information are important, because from them, and only from them, will you judge whether or not the defendants are guilty. Some

of these pieces of information will suggest to you the defendants' guilt. Others will suggest to you that innocence is a better explanation of the defendants' behavior. What you are doing in both cases is using your experience and reason to find which is the better explanation of all these pieces of information.

A criminal trial is a serious business. Under our Constitution, it is not enough to convict a man on the finding that guilt is a better explanation of the evidence than innocence. As I told you before, and I cannot overemphasize it; you must be convinced beyond a reasonable doubt. Not only must guilt be a [1011] better explanation of the evidence, it must be so good an explanation that you have no reasonable doubt about its being a correct one. Remember, only if you are convinced beyond a reasonable doubt can you find the defendants guilty.

The other basic principle has to do with the presumption of innocence. Under our law, it is a basic principle that a defendant is presumed to be innocent until such time, if that time ever comes, when he is proven to be guilty to your satisfaction beyond a reasonable doubt, and the presumption of innocence attaches to each defendant, the corporation as well as the individual, throughout the trial and throughout your deliberation, until such time, if it ever comes, when it is overcome to your satisfaction by proof beyond a doubt. If it is not so overcome by such proof, then it is your duty to acquit. If it is, and you feel that proof establishes each and every element of the crime to your satisfaction beyond a reasonable doubt, then it is your duty to convict.

The burden of proof is on the Government and it never shifts, but remains with the Government throughout the entire trial.

The defendant in this case did not take the [1012] stand. He could have if he had wanted to, but he didn't. You must be sure not to attach to that choice any inferences which

are of a prejudicial nature. He has a perfect right to remain silent. He has no obligation whatever to testify. The burden of proof is on the Government to prove the guilt of each defendant beyond a reasonable doubt, as I have indicated. The defendant is under no obligation to testify or to submit any proof. Once the proof has been submitted by the defendant, that proof must be weighed by you, must be judged by you, on the same plans and in accordance with the same principles as the proof submitted by the Government.

What do we have, briefly, by way of proof in this case? I don't want to review the arguments of counsel. I think they have both done that quite well. But as you look at the evidence in this case, there are certain elements which seem to be rather easy of appraisal and other elements which become, I think, much more difficult. Here again I want to stress the fact that you are the sole and exclusive triers of the fact, and again, I have no opinion and wish to inflict no opinion upon you.

One of the pivotal questions in this case from [1013] your standpoint is whether or not Carroll and Sheba Bracelets, Inc. were in the jewelry business in September, 1951. These two end use certificates, according to the regulations applicable at that time, had to be filed with the refiner, Kastenhuber & Lehrfeld, because otherwise the refiner couldn't turn over the gold; and there are here before you for consideration the invoices of Kastenhuber & Lehrfeld, the certified checks used by Carroll, which have his signature underneath, or what purports to be his signature underneath the name "Sheba Bracelets, Inc.," drawn on the National City Bank of New York; and you have these two certificates which were given to the refiner, against which the refiner, according to the Government's proof turned over approximately 150 ounces in gold to Carroll. There

is evidence to the effect, which you can believe or disbelieve, that Carroll followed a pretty consistent practice of obtaining cash from a man named Fisher, turning the cash over to a teller at the National City Bank downtown, obtaining a certified check, going to the refiner, turning over to the refiner the end use certificate along with the certified check, getting approximately 150 ounces of gold on each occasion and then going on most occasions to this office [1014] of Diamant on West 47th Street.

Ask yourselves this question: On September 14, 1951, was Carroll buying gold for the purpose of "manufacturing jewelry"? Did he, when he bought that gold, intend to use that gold for purposes of the business in which Sheba Bracelets was regularly engaged, or was he dealing in gold outside the law, without the scope of these regulations and for purposes which were entirely inconsistent with the statements made in these end use certificates?

There are invoices in this case made on the invoice forms of Sheba Bracelets, Inc., and which cover substantially the same period as the period of these end use certificates. These invoices purport to show sales of a very large quantity of bracelets for a very large amount of money, well over $600,000. Ask yourselves whether those invoices represent true, honest commercial transactions, or whether they were merely a sham o device to cover up dealing in gold outside of the law and outside of the regulations?

In that connection it becomes very important for you to decide whether Frank Brooks ever actually existed or not. You have heard the attorneys argue that, and I don't want to go over it, but it is one of [1015] the pivotal factual questions in this case. If you arrive at the conclusion that Frank Brooks was a sham and a fraudulent device to cover up gold transactions, if you arrive at the conclusion that Sheba Bracelets was not really manufacturing bracelets at all at this time, you see how the whole panorama of proof is illuminated.

On the other hand, if you find that Frank Brooks did exist, that he did buy these bracelets, that Sheba Bracelets, Inc. was manufacturing jewelry and Carroll was buying gold for the purpose of manufacturing jewelry, you see how that casts an entirely different light upon the proof in the case.

These purchases of gold from Kastenhuber & Lehrfeld amounted to over a half a million dollars, and the purported sale to Frank Brooks amounted, as I told you, to well over $600,000. The two specific transactions which are the subject of the four counts, the September 14th and the September 28th transaction, involved approximately 150 ounces of gold on each occasion and they cost something more than $5,000 on each occasion. So those two particular transactions are in themselves substantial enough, and you must ask yourselves whether on that day, in connection with that [1016] transaction, Sheba Bracelets and Carroll were engaged in that business and were going to use that gold in connection with the business in which they were regularly engaged.

One of the first witnesses was Mr. Crotty, the representative of the Assay Office, and I think it was his testimony that in September, 1951, the defendants were operating under a temporary license which permitted them to obtain a limited quantity of 150 ounces of gold at any one time; and, according to the license restrictions, the amount should not exceed in any case the amount necessary for their business, and in no event more than 150 ounces of fine gold. So that if you come to the conclusion that this gold was not obtained for the purpose of manufacturing jewelry and was not so used, you can see that a good part of the controversial issues in this case is swept away.

There are three essential elements constituting this offense: (1) The falsity of the statement; (2) the knowledge that these statements were false—I am referring now to the

manufacturing of jewelry statement and the use of the gold in the business in which the defendants were regularly engaged. Those are the two statements I am referring to. They had [1017] to be false and the defendants had to know that they were false—and then, thirdly, the presentation of the end use certificates to the refiner, Kastenhuber & Lehrfeld, had to be a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, and I told you as a matter of law that that was so, so that it leaves you with these other two elements which you have to ascertain on the basis of the factual controversy in this case.

Ask yourselves with respect to each defendant, was the statement false? Did the defendant know it was false?

"False statements" within the purview of the statute means statements that were intentionally made, with the knowledge of their falsity. "Knowingly" under the statute means that the defendants knew the falsity of these statements. "Wilfully," as used here, means the statements were made intentionally and deliberately, as distinguished from carelessly, negligently or inadvertently. You must be satisfied beyond a reasonable doubt not only that the statements were false, but that the defendants knew them to be false, and that they wilfully made the statements contained in the end use certificates.

[1018] It is not necessary for the prosecution to establish the Government was cheated or misled or that the defendants ultimately intended to cheat the Government. The crime, if there was a crime, was complete upon the submission of the end use certificate containing the false statements and with the other added necessary element, that each defendant knew the statement to be false at that time.

In other words, if this law was violated, it was violated the minute that end use cretificate was tendered for the gold and the gold obtained as a result of the use of this

end use certificate. Of course, you have to consider facts which transpired both before and after, because they tend to illuminate or explain what the persons or parties were doing at that time. But what you are leading to, the truth which you are trying to discover is whether at that very moment, on September 14, 1951, and on September 28, 1951, when Sheba Bracelets and Robert J. Carroll, treasurer, used these end use certificates for the purpose of getting on each occasion 150 ounces of gold. Were there these two false statements? Was either one of them false? Did the defendants know them to be false? Were these certificates used with that knowledge and [1019] intention? Were they acted upon with the false statements in them, to the effect that they were in the manufacturing jewelry business, when the defendants knew they weren't, to the effect that the gold was used for the business in which they were regularly engaged, when they defendants knew the gold was not to be so used? That is another way of putting the essential factual question in this case.

I charge you as a matter of law that the statements in these end use certificates which were allegedly false were material to the work of the Director of the Mint and that the execution of the said certificates was made a matter within the jurisdiction of the Office of the Director of the Mint.

If you find that the defendant Robert J. Carroll signed the end use certificates for semi-processes gold as president of Sheba Bracelets, Inc., the corporate defendant, that does not absolve him of personal criminal liability, if you find that the proof as to him otherwise satisfies the requirements I have indicated. The fact that the defendant corporation, Sheba Bracelets, Inc., may or may not be liable does not absolve the agent who makes the false statement, even though at the time of making the statement he is [1020] acting in a representative capacity. Corporate agents may be criminally liable individually for acts done

ostensibly in behalf of the corporation. Corporate officers or agents may be held criminally liable for acts done even though the corporation may or may not be liable.

Accordingly, if you find that the end use certificates, or either one of them, contained the false statements referred to, that Robert J. Carroll knew them to be false and that so knowing them he wilfully presented them to the refiner, Kastenhuber & Lehrfeld, Inc., with the purpose that the latter would take action thereon and turn over the gold in reliance thereon, that would be sufficient to find him guilty, even though he did not sign as an individual but as a corporate officer. The signature "Robert J. Carroll" appears on the face of these end use certificates as treasurer of Sheba Bracelets, Inc. It is up to you, and only you, to find whether or not the defendant on trial signed those certificates.

So far as the corporation, Sheba Bracelets, Inc., is concerned, the action of Robert J. Carroll in his capacity as treasurer may be deemed to be those of the corporation, and if such acts in furtherance of the [1021] corporation's business constitute a violation of law as set forth in the instructions, the corporation may also be held criminally liable.

With respect to the weight and credibility of witnesses there have been in one or two instances rather serious clashes of testimony in the case. Mrs. Diamant, for instance, did she tell the truth, the whole truth and nothing but the truth? John Sciabica, the former employee, did he tell the truth, the whole truth and nothing but the truth? You have to examine the testimony of the witnesses with great care and the law provides you with a few tests. It is not very different from what you do in your normal business and family relationships. One is the inherent probability of the story told by the witness. Did it have a ring of truth? Did it, in its general line, sound like something that could be believed? How about the demeanor of the

witness on the witness stand? Was the witness frank, open, attempting to explain to the best of his or her ability, attempting to give a forthright answer? Was the witness evasive? Was the witness attempting to dodge behind irrelevancies? Was the witness being less than frank? Was the witness perhaps honestly confused?

[1022] That brings you into the question of possible contradictory statements. Does that mean that the witness necessarily tells a lie? No, it doesn't. Honest people can be confused and sometimes a very clever prevaricator could be completely and utterly logical and consistent. You must bring to bear your mature judgment.

How about the possible interest of a witness? Did the witness strike you as having perhaps more than a passing interest in the case? Did they indicate to you in any way from the background brought out on the record that perhaps they would want to favor one side or another?

Then, too, consider that the proof is not judged by the number of witnesses or the number of documents. It is the essential quality of the proof that is important. It has been said that one man telling the truth can stand against the gates of Heaven. I think the purport of that statement is that one man telling the truth can be believed against a thousand prevaricators. But it is up to you to decide whether anybody lied in the case or whether anybody is open to the conclusion that there was a wilful falsehood uttered on the witness stand, because if there was the law gives [1023] you the right to reject all the testimony of such a witness. You don't need to reject it all. You can accept the part that you think is true and reject only that part that you think is false. But if you think that any witness told a wilful falsehood, then you have the right to reject all of it if you wish. Just like a person eating a fruit which is only partially sound, some persons will reject the whole fruit; others will cut around the imperfection and eat the part that is sound. You can do exactly that with

testimony that you think is infected or tainted by a wilful falsehood.

It has been said the pattern of truth in a case is very much like a mosaic, you know, these designs that you sometimes see in old churches and museums, I think the Metropolitan has quite a few of them, that are made of porcelain and glassware and of stone, colored in various ways. When you stand up close to it, it is very hard to discern the purpose of the artist, very often you will find that the lines between the pieces are irregular and not parallel. Sometimes they look confused. But you draw away from it and stand at a distance, you can discern the purpose of the artist.

The controverted issue of fact in a law [1024] court is very much like that. You should give yourselves the opportunity to draw away from it, not attempt in some instances to examine it from the standpoint of minutia or unimportant detail, but attempt to understand the overall impact of it and then ask yourselves the crucial questions which have to be answered in the case. I can't stress too much that the extent to which the proof is credible is entirely up to you, just as is the weight that you wish to give to any particular item of proof.

You have heard a number of witnesses for the Government and a number of witnesses for the defendant. You heard John Crotty, the Assay Office representative, who told you about the various licenses and end use certificates; and Mr. Quinn, the young man from the First National City Bank; about the withdrawals by certified checks; and Mr. Cybolski, the former bank guard, who testified about the meetings between Carroll and Fisher and how Carroll would obtain the cash and get the certified checks; Ludwig Geijer, who was the representative of Kastenhuber & Lehrfeld, who described the practice with respect to the purchases of gold and the requirement that certified checks be paid, and also the very important requirement that the end

use certificate [1025] be filed before they would surrender the gold. Then John Sciabica, a very important witness. He was employed when he was a young man at the Coney Island Avenue place of business—I don't refer to it as a factory, because that is one of the essential controversies in this case. Was it a front or was it a factory? It is up to you to decide were these parts of manufacturing equipment ever used? Was that gold dust and emery dust, or was it the dust of disuse?

Now, Sciabica testified that he worked there from July, '51 to March, '52, covering substantially the period which has been the subject matter of most of the Government's evidence, and particularly the period which is specifically mentioned in the four counts that are submitted to you for decision; and he testified that he never saw, as I recall it—here your recollection must control and controls to the exclusion of mine and the exclusion of the lawyers' recollection—as I recall it, he said he never saw any manufacture of jewelry bracelets, he never saw any gold on the premises and he never saw any of the jewelry-manufacturing equipment in use; and he worked there from 9:30 to 5:30 in the afternoon, but he wasn't there after 5:30 p. m. You can ask yourselves, was this a place that worked only [1026] at night, never worked during the day? Is it reasonable to believe that they were conducting a manufacture of jewelry business in the night time? Or is it more reasonable to believe that this manufacturing equipment was never used? It is entirely up to you to decide what went on there.

Then there was Harold Bloom, the accountant for Carroll in 1951, who identified certain books and records and said that he kept all the books from the checkbook is in court.

Then you heard Agent Newbrand. Then there was Magarill, the man who was in Philadelphia, the man who was in the roofing and sheet metal business and who has lived in and owned—I think he said he owned the house at

712 Poplar Street, Philadelphia, for many years, and that there was a dentist there by another name and that he never heard of Frank Brooks.

Did Frank Brooks exist? Did he live there or was he a fiction?

Then the defendant called Kertesz, whose testimony, I think, can be largely disregarded. Much of what he said with respect to how he made these bracelets has now been withdrawn from the case, so that part of it is clearly out of the case. Other testimony he gave, as [1027] I recall, was that in 1949, about two years before the transactions which are the subject matter of this case, he had a sale of jewelry with Sheba Bracelets, amounting to $608, if I recall correctly.

Now, it is entirely up to you to decide whether or not that '49 transaction has any bearing on what this company or this individual was doing in 1951. I can't see that it has any bearing at all, but it is in the case and you can give it such importance as you think it deserves.

Then there is Mr. Kivowitz, who was called, I think, as the last witness for the defendant. He was called to testify to a transaction in '49. I sustained an objection to it on the ground that it was irrelevant.

Then the defendant called Agent Sweeney. It is entirely up to you to decide whether Agent Sweeney destroyed Agent Newbrand, as I believe Mr. Palmer claims, or whether his testimony was substantially consistent with what Agent Newbrand testified to.

There was Yetta Diamant, who testified that she never saw any gold in her place of business, never weighed any gold, and that she knew Carroll and that he was a friend and also a business acquaintance; that they never did any gold business with him. It is entirely [1028] up to you to decide whether she told the truth, the whole truth and nothing but the truth.

Then there was very interesting testimony given by Joseph Polack, representative of the Philadelphia bank, with respect to that account, and I call your attention to two interesting facts with respect to the testimony. One was that the account ran from September, '49 to June, 1950, so that it was closed for more than a year before the transactions in question, and the other is that the highest balance indicated on their records was something like five or six thousand dollars.

There is also the testimony of another man with respect to a jewelry transaction in 1949, Bronston & Company. I think that man's name was Benach, but I am not sure of that spelling. Then Thomas McCormack, who testified that they assayed the bracelets that he bought in 1949. Frankly, I don't think that testimony has any bearing on the issues here as to whether or not Carroll and his company were engaged in manufacturing jewelry in September, 1951. That is the charge. The Government says that when they said they were doing this in '51, with respect to these end use certificates, with respect to these transactions, [1029] they lied, and knew they lied, and that is what you have to find.

If you think that these transactions in 1949 can help you decide that issue, that is entirely up to you, but I don't see how you can, and if an objection had been made earlier in the case with respect to the admission of that testimony, I would have ruled it out. I think it is of no importance, but it is only my opinion. I think they are irrelevant, but it is only my opinion at this point, because you have heard that evidence and it is before you.

Ladies and gentlemen, your verdict must be unanimous. The verdict may be guilty or not guilty with respect to either or both Sheba Bracelets, Inc. or John Carroll on any or all of Counts 2, 3, 10 and 11, four counts, two defendants, and the verdict should specify your finding of guilt or lack of guilt with respect to each defendant, and with respect to

each one of the four counts which are submitted to you. Your verdict should represent the independent conscientious determination of each of you after having fully and fairly discussed the evidence. The essence of the jury function is conscientious explaining and conscientious listening. Your foreman should act like a chairman [1030] of a committee, with enough formality to permit the easy flow of discussion, and yet enough informality to encourage your expression of individual opinion.

If you need any exhibits, you need only to ask for them and I will see that they are made available. If you want any of the testimony read to you, I will see that that is done. But you need only rely upon your own recollection. You need not call for any exhibits or any testimony to be read if you don't wish it. If any parts of my charge are not clear and you think that they require further clarification, you need only ask and I will be glad to help in any way I can.

I am sure that whatever your verdict is, you will arrive at it without fear, without favor and without prejudice, as you were sworn to do at the outset of the case.

Now, gentlemen, if there are any exceptions to my charge I will be glad to hear them in the robing room for a few minutes.

Do either one of you wish to take any exceptions at this time?

Mr. Palmer: If your Honor please—

The Court: I don't wish to hear them in the presence of the jury.

[1031] Mr. Palmer: No, I am going to do what you just said, go into your chambers with you.

I am asking your Honor in connection with what you said about the witnesses, namely, Sciabica and Diamant, that your Honor refer to my request in charge No. 16 with regard to Sweeney and with regard to Mr. Newbrand.

The Court: You are now asking me to consider your request in the presence of the jury, and I will not do that.

Mr. Palmer: I want you to just look at it.

The Court: I have looked at them all and I came in Saturday and spent all day looking at them.

Mr. Palmer: May we go into your chambers?

The Court: That is what I hoped you would do, yes.

Mr. Palmer: All right.

(The following took place in the Court's robing room:)

Mr. Palmer: I take exception to so much of your Honor's charge beginning with the words, as I recall it, "As to Frank Brooks, did he live there?" and all the other expressions which follow that with regard to various witnesses, including your Honor's reference [1032] to the importance of Sciabica's testimony.

If your Honor please, I ask your Honor—

The Court: Did I say whether Brooks lived there?

Mr. Palmer: Yes, you used those words.

The Court: Well, I will correct that.

Mr. Palmer: You said, "Did he live there?"

The Court: Well, the essential thing is whether he is a fictitious person.

Mr. Palmer: I know, but you said, you used the words, "Did he live there?"

The Court: Well, I will de-emphasize the use of the word "live."

Mr. Palmer: That is what I want.

The Court: I think you are entitled to that.

Mr. Palmer: That is what I want.

I ask your Honor, please, that in so far as you are concerned, that you charge the jury in connection with the language used—

Mr. Ruskin: Your Honor, might I just comment on that? Do you want to take them individually? Don't you think that the jury is entitled, in determining whether or not he existed, to consider whether he lived there?

[1033] The Court: Well, lived or worked there.

Mr. Ruskin: That is right.

The Court: I think Mr. Palmer is raising the question that by using the word "live" I have emphasized the question of his domicile there.

Mr. Palmer: And also, if your Honor please, that I consider the fact that you emphasized the fact that he couldn't have an address there with the dentist or anyone else. In other words, the question that you just now spoke about, was he nonexistent, to which the District Attorney made his observations, I took an exception. At the present moment, your Honor's saying, "Does he live there?" is immaterial.

The Court: All right, I heard you. Go to another one now.

Mr. Palmer: Also, with regard to your Honor putting the emphasis, as you did, upon the testimony of Sciabica and Mrs. Diamant. You did not in any wise emphasize, as I asked in paragraph 16, that the prosecution witnesses Sweeney and Newbrand are to be considered in the same light as any other witness, and that a Government witness is not entitled to any more credence than other witnesses.

The Court: I will charge that.

[1034] Mr. Palmer: All right.

I ask your Honor to charge the fact that the Government of the United States is part of this action and that the Government is the same as any other party, and its counsel should be treated as counsel for any other party.

Mr. Ruskin: I think you charged that.

The Court: Well, I thought I covered that in substance. I will try to cover that again, but not in those words.

What else?

Mr. Palmer: You use your own words.

I ask your Honor to charge the jury that in connection with any ruling that you made during the course of the trial, as well as during the course of my summation to the

jury, that all they do is to take the law from you, and that the observations of either counsel—

The Court: I have covered that. I won't go into that matter again. I think I have covered it sufficiently.

Go ahead.

Mr. Palmer: That is all.

The Court: Have you got anything?

[1035] Mr. Ruskin: The only thing that I can suggest, Judge, is some mention of the fact that sympathy is not to enter into their deliberations. The wife has been in the courtroom the last few days. She is sitting at the defense table right now.

Mr. Palmer: The jury is not in there.

The Court: Yes, they are. She shouldn't do that. I have already told her not to do it.

Mr. Palmer: Also, your Honor, on that score I ask you to even it up by saying they must not be prejudiced in favor of the Government.

The Court: No, I will give them the charge about without fear or favor.

(The following took place in the courtroom:)

The Court: Please be seated, ladies and gentlemen.

I might say that I have authorized the marshals to take you to lunch as soon as you wish to go. You need not go right away. If you wish, you can go right away and start your deliberations after lunch. So please consult your own convenience entirely. I believe that they have made preparation so that there will be no inconvenience to take you immediately.

There are one or two matters which counsel [1036] have brought up which I think I ought to refer to.

If I said that it is up to you to decide whether Brooks lived in Philadelphia and I have in any way overemphasized the term "lived," please reject that as any attempt to circumscribe your function. The controversy, as I under-

stand it in this case, has to do with whether or not Brooks existed or whether he didn't exist. It is not a question as to whether he was domiciled in that address or whether he worked at that address. The question essentially is whether Brooks ever existed as the purchaser of these bracelets from Sheba Bracelets, Inc. and Carroll, because that, in turn, has a very important and direct bearing on whether or not during the crucial period in 1951 Sheba Bracelets and Carroll were really engaged in the jewelry-manufacturing business or not.

So that I repeat, it is an extremely important factual issue in this case for you to decide whether Brooks existed, not necessarily whether he lived—and I underscore "lived" —or worked at that address, but actually whether he existed.

Now, I think I have sufficiently stressed the question of quality. No witness who takes the stand comes to the witness stand with any badge of superiority. [1037] One of the reasons why you were brought from your livelihood, sometimes at great inconvenience, to sit on a jury is because you can bring from your varied occupations and your varied backgrounds a measure of prudence, a measure of balance, which is extremely precious, and you should bring to bear with respect to each witness on an equal footing the sum total of your background and experience for the purpose of determining whether that witness or whether any particular item of documentary proof is entitled to credibility, and if it is entitled to credibility, how much weight do you want to attribute to it. That goes for every piece of evidence in the case. Every witness in the case is on the same footing.

I have been asked to say something about your discharging your functions without fear, favor or sympathy. I don't want to repeat that. I think I have sufficiently stated it. You are charged with an extremely important duty in this case, a duty which is important to the Govern-

ment and a duty which is important to the defendants. You should discharge it without any prejudice for or against either side, without any fear for or respect to either side, and without any prejudice, and I am sure you will do just that.

[1038] Now, I want to thank the alternate jurors. The law requires that the case be considered by only twelve jurors, but I think that a very special vote of thanks is due to both Mrs. Reynolds and Mr. McKenna for their very conscientious attention to the case, and you can be sure that by virtue of your attendance here, particularly since we have had interruptions by two weekends, then in the middle of one week, you guaranteed the continuity of the case, and for that I am very grateful.

So you are both discharged with my very sincere thanks.

The marshals will please be sworn in at this time.

(The marshals were sworn.)

The Court: All right, the jury may retire and the alternate jurors are excused.

(The jury retired at 12:48 p. m.)

(Recess to 2:00 p. m.)

[1039] (The following took place in the absence of the jury:)

The Court: Gentlemen, I will deal with this matter of exceptions to the charge now.

Let me state for the record that pursuant to my request, both the United States Attorney and the defense counsel submitted numerous requests to charge, which were in my hands within the time that I requested. The defense counsel submitted them Saturday morning, at approximately eleven, and I received them immediately, and I had ample time to scrutinize them.

I want the Clerk to mark them as a Court's exhibit, and I have charged all of the requests which defense counsel asked me to charge, in substance, and to the extent that I

have failed to charge any of the matters contained in his requests, in the very words which he requested, he may have an exception.

(Marked Court's Exhibit No. 12.)

Mr. Palmer: Your Honor, I don't care as to 35, 36 and 37, in what manner your Honor changes the words. All I wanted to do was to find out whether your Honor will charge in connection with those Requests 35, 36 and 37, and also 34, the meaning of what is set forth in there.

[1040] The Court: Well, you attach special importance, I take it, to 35, 36 and 37.

Mr. Palmer: Yes, your Honor.

The Court: 35 reads as follows:

> "In this connection I charge you that it is not the duty of the defendants to prove that they did manufacture jewelry, but the Government has the burden throughout to prove that the defendant Sheba Bracelets, Inc. was not in the business of manufacturing jewelry."

I think that I covered that in substance in my charge by saying that the duty is always on the Government to prove each and every essential element of the charge to the jury's satisfaction beyond a reasonable doubt, and I told them what the essential elements were.

Now, 36 reads as follows: "I charge you that if you find that the defendant Sheba Bracelets, Inc. did manufacture jewelry in 1949 the law presumes that said defendant continued such manufacturing until the reverse is proven."

Then various cases are cited. I looked at those cases and I don't think that any of those cases justifies the charge suggested. Proof that Sheba Bracelets, Inc. did some manufacturing in 1949, in my [1041] opinion, is irrelevant. However, to the extent that it was already in the record,

I allowed the jury to consider it for what it was worth. Any manufacturing which was related in time or in substance to the transactions or to the times of the transactions which were the subject matters of the indictment would in my opinion have had probative value, but not these, so that is the reason why I denied that charge.

No. 37 reads: "I therefore charge you that unless you find that the Government has proven beyond a reasonable doubt that the defendant Sheba Bracelets, Inc. had entirely ceased the manufacturing of jewelry in September, 1951, you must bring in a verdict of not guilty."

I think that was substantially covered by my charge, by saying that the Government had the burden of proving each and every element of the crime beyond a reasonable doubt, and one of the elements was the falsity of the statement in the end use certificate, and the other element was the element of wilfulness, and I think that that is quite sufficient.

All right. Now, I think you have got the record clear.

What is the number of the Court's exhibit?

[1042] The Clerk: 12.

The Court: 12. And that covers all of the requests submitted by Mr. Palmer.

Gentlemen, I am directing the Clerk to give you back the respective papers that belong to you, which have been marked as Court's exhibits. If they came out of your files, Mr. Ruskin, you will be charged with the duty of protecting them. If they came out of Mr. Palmer's files, he will be charged with the duty of protecting them.

Is that understood?

Mr. Ruskin: Yes.

The Court: I have no facilities for taking care of so many papers.

All right, call in the jury.

(Jury in box at 2:25 p. m.)

Verdict

The Clerk: Ladies and gentlemen, please answer "Present" as your name is called.

(Roll call of jurors.)

The Clerk: Mr. Foreman, have you arrived at a verdict?

The Foreman: Yes, we have.

The Clerk: What is your verdict?

The Foreman: We find the defendants guilty on [1043] all four counts.

The Court: Is there a motion to poll the jury?

Mr. Palmer: No motion to poll the jury.

The Court: Now, ladies and gentlemen, you are discharged with my thanks. It is very clear to me that the verdict was justified by the evidence in this case. I understand that you are discharged for the rest of the term, and I hope that the interruptions of the trial have not inflicted too great an inconvenience. But I want you to know that to the extent that you have been inconvenienced, it is very, very much appreciated. We couldn't function in these cases without a conscientious jury.

Thank you very much.

(Jury excused.)

* * *

Affidavit of Robert J. Carroll, Read in Support of Motion to Suppress

(Record pp. 1155-1161)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

CITY OF NEW YORK
STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK

ROBERT J. CARROLL, being duly sworn, deposes and says:

That he is one of the defendants in the instant action and makes this affidavit in support of a motion made pursuant to Rule 41 of the Rule of Criminal Procedure.

Deponent was arrested on September 28, 1951, in front of premises No. 10 West 47th Street, New York City. After deponent's arrest he was taken to No. 90 Church Street, New York City, and was there questioned by at least nine Government agents and representatives throughout the entire day. After such interrogation deponent was taken to the West Street jail where he met Mr. Diamant and Mr. Popper, who had also been arrested.

The next morning deponent was taken to the Federal Building and was again questioned for over an hour, until he was arraigned and admitted to bail. Deponent then went back to the premises of the Sheba Bracelets, Inc., where he met Mr. Adler, who worked on the premises and informed deponent that Secret Service Agents had been there and had ransacked the premises and had removed certain records from the premises.

Affidavit of Robert J. Carroll

Deponent desires to emphasize that during the trial he learned, for the first time, that his arrest and the search made by the Secret Service Agent was made without a warrant.

About six months after deponent's arrest Mr. Olson, an Internal Revenue Agent, visited the plant at Coney Island and told deponent that he wanted to check the records of the Sheba Bracelets, Inc., for tax purposes and on several occasions examined the records in the premises. He asked deponent for certain other books and records which were apparently missing and mentioned that among the missing records were the general ledger, payroll book, certain invoices, cancelled checks and miscellaneous items. Deponent informed Mr. Olson that the Secret Service Agents had searched the premises and were seen to have removed certain records.

Several months later, in October or November of 1952 another Internal Revenue Agent, Louis Sitkoff, called deponent at his home and asked deponent to visit his office. Deponent went there the following day and Mr. Sitkoff told deponent that he wanted the books of the Sheba Bracelets, Inc., and stated that his ta investigation had nothing to do with the instant indictment and promised deponent that he would return those books in a few days, or at the most in a week. Relying on said promise deponent turned over to Mr. Sitkoff certain books, to wit, accounts receivable ledger, cash disbursement and cash receipt books. Mr. Sitkoff called deponent several days after he received the books and told deponent that several books were missing. Deponent repeated to him the same thing that he had told Mr. Olson, to wit, that the Secret Service Agents had searched his place of business in his absence and had been seen to remove certain books from said premises.

In spite of Mr. Sitkoff's promise to return the aforesaid books to deponent within a short time said books were never returned to him and deponent never saw those books

again until June of 1956, when he visited the office of the Assistant United States Attorney in charge of this case. It was then for the first time that deponent learned that the Internal Revenue Department had turned over the books which were given to them in connection with the alleged tax investigation to the United States Attorney's office for the purpose of the instant proceeding.

Deponent is informed by his attorney that the powers of the United States Secret Service relating to an arrest are determined by Section 3056, Title 18, U. S. Code, which reads as follows:

> "Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States and members of his immediate family, the President-elect, and the Vice President at his request; detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; detect and arrest any person violating any of the provisions of sections 508 and 509 of this title and, insofar as the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks and national farm loan associations are concerned, of sections 218, 221, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, and 1909 of this title; execute warrants issued under the authority of the United States; carry firearms; offer and pay rewards for services or information looking toward the apprehension of criminals; and perform such other functions and duties as are authorized by law. As amended July 16, 1951, c. 226, § 4, 65 Stat. 122; Aug. 31, 1954, c. 1143, § 2, 68 Stat. 999."

Affidavit of Robert J. Carroll

Deponent is informed by his attorney that agents of the United States Secret Service are empowered to arrest a person only for those offenses which are expressly enumerated in said section and that none of the crimes referred to in the indictment are included in said Section 3056. Neither Section 95(a) of Title 12, U. S. Code, nor Section 371 of Title 18, U. S. Code, as referred to in Count One of the indictment, nor Section 1001 of Title 18, U. S. Code, as referred to in Counts Two, Three, Ten and Eleven of the indictment, are included in said section.

It appears therefore that the agent of the United States Secret Service had no power to arrest deponent, regardless whether said agent had reasonable grounds to believe that a felony had been committed.

Moreover, deponent is informed by his attorney that a comparison of the powers given to the Federal Bureau of Investigation, as defined in Section 3052, with the powers given to the agents of the United States Secret Service shows that the agents of the Secret Service have no power to arrest without a warrant even if the offenses referred to indictment were included in said section and even if the agent had reasonable grounds to believe that a felony had been committed. While Section 3052 expressly gives agents of the Federal Bureau of Investigation power to make arrests *without warrant*, Section 3056 gives no such power to the United States Secret Service Agents.

Since it appears conclusively from the foregoing that deponent's arrest was illegal, any search of his person and of the premises of the Sheba Bracelets, Inc., as incidental to said arrest, was unlawful and any documents seized by the Government in connection with said arrest cannot be admitted in evidence. *Trupiano* v. *U. S.*, 68 Sup. Ct. 1229, 334 U. S. 699; *United States* v. *Coplon* (C. A. 2nd), 185 Fed. (2d) 629, cert. den. 72 Sup. Ct. 362, 342 U. S. 920.

Deponent is also informed by his attorney that the search of the premises of the Sheba Bracelets, Inc., without

a warrant of arrest and without a search warrant was illegal for still another reason. It is conceded by the Government that the agents of the Secret Service trailed him for a period of approximately two weeks. Deponent is informed by his attorney that in the case of *Trupiano* v. *United States*, supra, the Supreme Court of the United States has laid down the rule that premises cannot be searched without a warrant even in connection with a lawful arrest if there was sufficient time to procure such a search warrant.

Deponent is also informed by his attorney that under the authorities above cited the documents seized by the Government must be returned to deponent, or at least that those documents cannot be admitted in evidence. In this connection deponent is informed by his attorney that it is entirely immaterial whether the documents in question were taken by the Government by force or whether some of those documents were turned over by deponent to the Agent of the Internal Revenue Bureau after his arrest when they stated that they were making an investigation of deponent's books for tax purposes. Deponent is informed by his attorney that any such turning over of said books and records cannot be considered as voluntary since anything done by deponent after his arrest must be presumed to have been done under compulsion. *Johnson* v. *U. S.*, 68 Sup. Ct. 367; *United States* v. *Lerner*, 100 Fed. Supp. 765; *Nelson* v. *United States*, 208 Fed. (2d) 505; *Takahashi* v. *United States*, 143 Fed. (2d) 118.

Deponent is further informed by his attorney that the obtaining of documents by the Government through any ruse constitutes an unreasonable search and seizure, within the meaning of the Fourth Amendment to the Constitution, and that documents so obtained must be returned to deponent and cannot be admitted in evidence. *Gouled* v. *United States*, 41 Sup. Ct. 261, 255 U. S. 298; *Johnson* v. *United*

States, supra; *Fraternal Order of Eagles* v. *United States*, 57 Fed. (2d) 93; *United States* v. *Mitchneck*, 2 Fed. Supp. 225; *Weeks* v. *United States*, 232 U. S. 383, 34 Sup. Ct. 341; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 44 Sup. Ct. 336; *United States* v. *Lagow*, 66 Fed. Supp. 738; *Takahashi* v. *United States*, supra.

It appears from the foregoing that deponent had turned over certain books and records to Internal Revenue Agent Sitkoff relying on his statement that the Internal Revenue Department desired the books for a tax investigation and also relying on his promise that he would return said books and records to deponent in a very short time. Deponent would never have turned over said books and records to the Government agents if he had been advised that those books were being requested in connection with the instant proceeding and if he had known that the Internal Revenue Department would turn over those books to the United States Attorney's office in connection with the instant proceedings.

Deponent is further informed by his attorney that the Supreme Court of the United States has, in the case of *Silverthorne Lumber Co. Inc. et al.* v. *United States*, 40 Sup. Ct. 182, 251 U. S. 385, laid down the fundamental rule that the Government is not permitted to use the knowledge it has obtained through an illegal search and seizure and that therefore the Government cannot be allowed to use any knowledge which it may have obtained through the purported tax examination of certain books and records in the instant proceeding. Deponent is also informed by his attorney that according to the *Silverthorne* case, supra, the constitutional provision against unlawful search and seizure applies to corporations as well as to individuals.

Deponent is informed by his attorney that based upon the foregoing facts and law the motion pursuant to Rule 41 of the Rules of Criminal Practice should be granted.

although said motion was made during the trial. It appears from the foregoing that deponent had had no opportunity to make the motion at a prior time and was not aware of the grounds for such motion.

As heretofore stated, deponent, during the trial, learned for the first time that his arrest and the search were made by the Government without a warrant. Moreover, deponent was never represented by counsel until June, 1956, when he retained Archibald Palmer. Deponent is informed by his said attorney that under those circumstances the motion pursuant to Rule 41 is timely made, aside from the fact that the Court always has the discretion to entertain such motion at the trial. *Rule 4, subd. (e) (last sentence)*: *Gouled* v. *United States*, supra; *Wrightson* v. *United States*, 225 Fed. 556; *Contee* v. *United States*, 215 Fed. (2d) 324.

Finally, deponent is informed by his attorney that even if he were not entitled to the return of the books and records illegally seized, said books and records cannot be admitted in evidence since they were taken from deponent in connection with an illegal arrest. *United States* v. *Coplon*, supra.

WHEREFORE, deponent respectfully prays that the motion made pursuant to Rule 41 be, in all respects, granted.

ROBERT J. CARROLL.

(Sworn to September 18, 1956.)

Affidavit of Robert K. Ruskin, Read in Opposition to Motion to Suppress

(Record pp. 1124-1127)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

ROBERT K. RUSKIN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul W. Williams, United States Attorney for the Southern District of New York, and as such am in charge of the trial of this case.

2. The defendants herein, Robert J. Carroll, Emil Popper, Louis Fisher, Samuel Diamant and Sheba Bracelets, Inc., were indicted on August 25, 1951 in Indictment C139 165. At the time of his arraignment the defendant Robert J. Carroll was represented by his brother-in-law Eugene Nadelman.

3. On June 15, 1956, this case was on the trial calendar in Courtroom 318 before Judge John F. X. McGohey, having been referred back to that part by Judge Richard H. Levet, to whom it had been assigned for trial, because of the failure of the defendant Carroll to retain trial counsel.

4. In order to refresh my recollection as to the exact nature of the proceedings that took place in Courtroom

318 that day, I have played back a record made by the Court Reporter. I have quoted portions of what was said where it is particularly pertinent to the instant motions.

5. When the case was first called on the calendar, Carroll appeared without an attorney. He was questioned by Judge McGohey about whether he had retained an attorney. Carroll said that he had retained Archibald Palmer 4 or 5 years ago. The court instructed me to call Mr. Palmer's office immediately, which I did.

6. Mr. Palmer, shortly thereafter, appeared in court and when questioned, denied that he had been "retained" by Carroll, but did state that he had consulted with Carroll about this matter many years ago for which he believed he received a $100 fee. Judge McGohey then, because of Carroll's misrepresentation to the Court about having retained Mr. Palmer, revoked the defendant's bail and ordered him remanded.

7. Later that some morning, when Mr. Palmer filed a Notice of Appearance for Carroll, Judge McGohey rescinded his order revoking the bail.

8. It was at this point that Mr. Palmer made the following statement to the Court:

> "At the time that he [Carroll] *was seized without a warrant* and I don't want to waste any time on technicalities, they took from him various papers in connection with the situation and I want those papers back or at least I want to put him in a position where so far as I'm concerned I can see what they are."

9. I believe that this statement by Mr. Palmer is particularly significant in view of the fact that Mr. Palmer has

represented to the Court at this trial that he first became apprised of the fact that Carroll was arrested without a warrant during the trial.

10. Mr. Palmer also stated to Judge McGohey that *he would be prepared to begin the trial* of this matter on June 26, 1956, and the case was adjourned to that date.

11. Within a few days after June 15, 1956, I had a conversation with Mr. Palmer in which Mr. Palmer made reference to what he said was the illegal manner in which documents were obtained in this case, both in arresting Carroll and in searching the premises of Sheba Bracelets, Inc. in Brooklyn. Mr. Palmer asked me for a list of all documents taken off the person of Carroll at the time of his arrest. I have never acceded to Mr. Palmer's request.

12. On or about May 31, 1956, pursuant to my request, Special Agent Hyman L. Boller, Internal Revenue Service, turned over to me certain records of Sheba Bracelets, Inc., in addition to other corporate records.

13. On at least two or three occasions before trial, the defendant Carroll, with Mr. Palmer or other persons, has come to my office where he has been given the opportunity to inspect fully any of said records of Sheba Bracelets, Inc. in the possession of the Government.

14. I have inspected all of the documents referred to in (a) the affidavit of Robert J. Newbrand and (b) the affidavit of John W. Braun as having been taken from the premises at 2747 Coney Island Avenue, Brooklyn, N. Y. on September 28, 1951. None of these documents have been offered in evidence by the Government in this case nor did I make use of such documents in the preparation for trial.

Affidavit of Edward F. Sweeney

15. On September 17, 1956 I communicated with the Federal House of Detention and spoke to Mr. Franciscus, who is the Parole Officer there. Mr. Franciscus advised me that the records of the Federal House of Detention indicate that the defendant Carroll was brought there on September 28, 1951 at 5:58 P. M. by Special Agent Edward Sweeney. He further advises me that according to the records, the defendant Carroll was retained there overnight, again released to Agent Sweeney at 10:08 A. M. on September 29, 1951, and that there is no record of Carroll being brought back to the prison.

ROBERT K. RUSKIN,
Assistant U. S. Attorney.

(Sworn to September 18, 1956.)

Affidavit of Edward F. Sweeney, Read in Opposition to Motion to Suppress

(Record pp. 1128-1130)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

EDWARD F. SWEENEY, being duly sworn, deposes and says:

1. I am a United States Secret Service Agent and have been for the past 17 years. I am now assigned to Boston, Massachusetts, and during 1951 was attached to the New York office.

Affidavit of Edward F. Sweeney

2. On September 28, 1951, at 9:30 A. M., as part of my official duties, I went to the office of Assistant United States Attorney Louis Kaplan. At this time Mr. Kaplan advised that as soon as the Commissioner arrived the Government would obtain a warrant of arrest for Robert J. Carroll, Emil Popper and Samuel Diamant, and also a search warrant for Diamant's premises at 10 West 47th Street, New York, N. Y.

3. Around 10:30 A. M. Agent Newbrand called me at Mr. Kaplan's office and told me that Carroll had just gone in to the offices of Kastenhuber & Lehrfeld, Inc., 21 West 46th Street, New York, N. Y. After giving orders to Agent Newbrand, I advised him that the arrest and search warrants had been authorized by Mr. Kaplan who was waiting for the Commissioner.

4. I immediately proceeded to the Railroad Ticket Office, opposite 10 West 47th Street, where at approximately 11:45 A. M. I joined Agent Newbrand and the defendant Carroll. Agent Newbrand and I then went to the office of S. Diamant located on the third floor at 10 West 47th Street, where Samuel Diamant was placed under arrest.

5. A little while later a search was conducted of the premises and no fine gold was found. Before the search took place, I gave Samuel Diamant a copy of the search warrant. I took Samuel and Yetta Diamant to the Secret Service Office at 90 Church Street, arriving there at approximately 1 P. M.

6. At approximately 2 P. M. I asked the defendant Carroll if he wanted something to eat and he replied he did not feel like eating. During the entire afternoon I questioned the defendant Carroll for a maximum period of 1½ hours. From time to time during the questioning, my

superior, Special Agent in Charge Albert E. Whitaker would enter the room and join me in the questioning of Carroll. No other agents were present during the interrogation of Carroll.

7. While questioning Carroll at 90 Church Street, New York, N. Y. on September 28, 1951, I took certain articles off his person. At that time, I had personal knowledge of the fact that an arrest warrant had been issued against Carroll. To the best of my knowledge, this was the first time on that day that Carroll was searched or that any papers were taken from him.

8. At approximately 4:30 P. M. I called Mr. Kaplan who advised me that since it was too late to arraign the defendants that day, I should leave them at the Federal House of detention overnight. I left the Secret Service offices with the defendants at approximately 5:20 P. M. and arrived at the Federal House of Detention at approximately 5:45 P. M.

9. I inquired of the prison authorities as to whether it was too late for the prisoners to get supper and was advised that it was not.

10. Pursuant to Carroll's request, I called his brother-in-law, Eugene Nadelman, that evening and told him that Carroll was then at the House of Detention. I told him the cause of the arrest and advised him that Carroll would be brought to the United States Court House the next morning for arraignment.

11. At approximately 10 A. M. on September 29, 1951, I picked up Samuel Diamant, Emil Popper and Robert J. Carroll at the Federal House of Detention and took them

to Mr. Kaplan's office. Mr. Kaplan took a written statement from Emil Popper but did not take a written statement from either Carroll or Diamant.

12. At approximately 12:30 P. M. the defendants Carroll, Popper and Diamant were taken before the United States Commissioner and arraigned. Carroll's brother-in-law, Eugene Nadelman, represented him at the arraignment.

Sworn to before me this
18th day of September, 1956.

EDWARD F. SWEENEY.

Affidavit of Robert J. Newbrand, Read in Opposition to Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. NEWBRAND, being duly sworn, deposes and says:

1) I am a Secret Service Agent and am presently assigned to the Presidential Protection Detail, at the White House, Washington, D. C.

Affidavit of Robert J. Newbrand

2) On September 28, 1951 at approximately 2:00 PM John Braun of the U. S. Assay Office and I went to 2747 Coney Island Ave., Brooklyn, N. Y., the premises of Sheba Bracelets Inc.

3) On the premises at that time were Mr. Sol Adler and his son Ralph. Mr. Adler identified himself as the foreman of the Carroi Instrument Company. I asked Mr. Adler for permission to look around the premises and he willingly consented.

4) Mr. Braun and I made an inspection of the premises. An inventory of the gold manufacturing equipment on the premises was taken by Mr. Braun.

5) I questioned Mr. Adler and his son and took signed statements from them.

6) I removed the following documents from these premises: a) 3 sales invoice tablets, b) several Post Office Department return receipt cards and c) several cancelled checks.

7) I did not remove any books or records other than those mentioned above. I have looked at the exhibits introduced by the government in this case and none of them are in whole or part any of the records I took.

8) To the best of my knowledge no use has been made of any of the records described in paragraph 6 of this affidavit nor were any investigative leads obtained from those documents.

ROBERT J. NEWBRAND.

(Sworn to September , 1956.)

Affidavit of John W. Braun, Read in Opposition to Motion to Suppress

(Record pp. 1133-1137)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JOHN W. BRAUN, being duly sworn, deposes and says:

1. I am presently employed by the Bureau of Accounts, U. S. Treasury Department, Washington, D. C., as an auditor. I was formerly employed by the Bureau of the Mint, Washington, D. C. from May 1949 until September 10, 1956.

While with the Bureau of the Mint, among my duties I was required to make visits to gold users, gold licensees, and applicants for gold licenses for the purpose of inspecting premises where gold was used in manufacturing. I observed the products and processes, and at times, examined the books and records of the manufacturers.

2. On July 25, 1951 as part of my official duties, I accompanied Special Agent Robert Newbrand, U. S. Secret Service, to the plant of Sheba Bracelets, Inc., at 2747 Coney Island Avenue, Brooklyn, for the purpose of inspecting the premises and requesting the books and records of that corporation for a Mint examination in connection with their use of gold. Mr. Carroll was not there at the time and we were told by Mr. Sol Adler that Carroll would return after lunch.

Affidavit of John W. Braun

3. When we returned after lunch, Mr. Adler told us that Carroll had called and said he would be in later, so we waited for him.

4. Later Robert Carroll telephoned again and I explained to him the purpose of our visit, that is, that I wanted to inspect the premises and examine his books and records. Carroll stated he had no objection to our examination but that none of the employees there at the time had sufficient knowledge of the books and records to release them to us. Carroll agreed to meet us at 4:00 P. M. that same afternoon at the U. S. Assay Office, 32 Old Slip, New York.

5. At 4:40 P. M. Mr. Carroll arrived at the Assay Office, we discussed the audit of his records and I furnished him a list of the books needed for such an examination. Mr. Carroll took the list and agreed to send the records to the Assay Office the next day.

6. The records were not sent to the Assay Office the following day but on Friday, July 27, 1951, a messenger named Ralph Adler appeared at the Assay Office with the books and records. He delivered a request for a receipt from Mr. Carroll. I have attached hereto and marked as Exhibit A a photostatic copy of said request.

7. After inspecting the books and records, I gave the messenger, Mr. Adler, a receipt for their delivery. I have attached hereto a photostatic copy of this receipt which is marked as Exhibit B. The receipt was made and signed in duplicate, the copy being given to Mr. Adler.

8. On August 3, 1951, Mr. Carroll was advised that since the audit was completed, he could have his records back upon the return of the receipt given for them. That

same day, he sent a messenger for the books and records. The messenger returned the copy of the receipt previously given.

9. On September 28, 1951, following the arrests of Robert J. Carroll and Samuel Diamant I again accompanied Agent Newbrand to the premises of Sheba Bracelets, Inc. Agent Newbrand and I asked permission of Mr. Adler to inspect the premises and Mr. Adler consented. Newbrand interviewed Sol Adler and his son, Ralph. I inspected and inventoried the gold manufacturing equipment at the rear of the premises. I also looked through the machine shop, the office and the basement.

10. The only paper I removed from the premises was one small sheet listing names of Brazilian companies. This was the only document I removed from the premises and I did not inspect nor remove any accounting books and records of Sheba Bracelets, Inc.

JOHN W. BRAUN.

(Sworn to September 18, 1956.)

Exhibit A, Annexed to Affidavit of John W. Braun

Tel. NIghtingale 8-7031

SHEBA BRACELETS, INC.
2747 CONEY ISLAND AVENUE
BROOKLYN 23, N. Y.

Mr. Tobin

Please give my boy a receipt for the enclosed packag

R. J. CARROLL

Exhibit B, Annexed to Affidavit of John W. Braun

[SEAL]
Office of
The Superintendent
U. S. Assay Office
32 Old Slip

TREASURY DEPARTMENT
UNITED STATES MINT SERVICE
NEW YORK 5, N. Y.

July 27, 19
(date)

I, Robert J. Carroll, (name) Sec.-Treas. (position) of Sheba Bracelet Inc., a corporati located at 2747 Coney Island Ave., Brooklyn, New Yor have freely and voluntarily surrendered the following list corporate records to John W. Braun, who has identifi himself to me as a representative of the Treasury Depa ment, Bureau of the Mint, for the purpose of examinati in connection with the corporate acquisitions and dispo tions of gold.

Affidavit of Louis Sikoff

RECORDS:

1. Bound book—General Ledger from 12/31/48—5/31/51
2. " " —Cash Receipts Dec '48—May '51
3. " " —Cash Disbursements Dec '48—May '51
4. Loose Leaf Ledger Type book
5. 1—Envelope purchase invoices & Sales invoices
   1—Envelope cancelled checks

ROBERT CARROLL
By
Signed: RALPH TOBIN

Received above records:

JOHN W. BRAUN
Bureau of the Mint

DOROTHY ROSSITTI
Witness

Affidavit of Louis Sikoff, Read in Opposition to Motion to Suppress

(Record pp. 1138-1139)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

LOUIS SIKOFF, being duly sworn, deposes and says:

1. I am a Revenue Agent of the Internal Revenue Service and am attached to the Brooklyn Office.

Affidavit of Louis Sikoff

2. On April 27, 1954, Robert J. Carroll appeared at the Office of the District Director of Internal Revenue, 210 Livingston Street, Brooklyn, New York and voluntarily submitted the following books and records of the Sheba Bracelets, Inc. in connection with an income tax examination then in progress:

a. Cash disbursement book;

b. Cash receipts and purchase book;

c. General Journal;

d. Accounts receivable and accounts payable ledger; and

e. Miscellaneous purchase bills and sales invoices. No general ledger was submitted.

3. All records of the corporation were requested from Robert J. Carroll in connection with an income tax examination of the corporation for the years 1948, 1949, 1950 and 1951.

4. No subpoena or other legal document was issued to Robert J. Carroll for the above books.

5. These books were in my possession until October 28, 1954, at which time they were turned over to Special Agent Hyman L. Boller at his request.

6. To the best of my knowledge and belief the above statements are true.

LOUIS SIKOFF.

(Sworn to on September , 1956.)

Affidavit of Hyman L. Boller, Read in Opposition to Motion to Suppress

(Record pp. 1140-1141)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TATE OF NEW YORK
OUNTY OF NEW YORK
OUTHERN DISTRICT OF NEW YORK } ss.:

HYMAN L. BOLLER, being duly sworn, deposes and says:

1. I am a Special Agent of the United States Internal evenue Service, 90 Church Street, New York, New York.

2. That in connection with an official income tax inves- gation being conducted by me of Sheba Bracelets, Inc., d Robert J. Carroll, I borrowed from Revenue Agent uis Sitkoff, on October 28, 1954, the following corporate ecords of Sheba Bracelets, Inc.:

Cash Disbursements book, cash receipts and purchase ok, accounts receivable and payable ledger, general jour- l, and miscellaneous sales and purchase invoices.

3. On May 12, 1955 Robert J. Carroll visited my office d voluntarily submitted bank statements of Sheba Brace- s, Inc. for the years 1949, 1950 and 1951.

4. On May 31, 1956, all of the aforementioned books d records of Sheba Bracelets, Inc. were turned over Assistant United States Attorney Robert K. Ruskin his request. I have not turned over to Mr. Ruskin nor s he requested any of the personal books and records Robert J. Carroll.

Reply Affidavit of Robert J. Carroll

5. To the best of my knowledge and recollection the above statements are true.

HYMAN L. BOLLER.

(Sworn to on September 18, 1956.)

Reply Affidavit of Robert J. Carroll, Read in Support of Motion to Suppress

(Record pp. 1146-1154)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

CITY OF NEW YORK
COUNTY OF NEW YORK } ss.:
STATE OF NEW YORK

ROBERT J. CARROLL, being duly sworn, deposes and says:

That he is one of the defendants in the above entitled proceeding and makes this affidavit in reply to the affidavits submitted by the Government in opposition to the motion made pursuant to Rule 41 of the Rules of Criminal Procedure.

Deponent asserted in his main affidavit that he was arrested without a warrant and that the premises of the defendant Sheba Bracelets, Inc., were searched without a search warrant. The affidavits of Mr. Sweeney and Mr. Newbrand, Secret Service Agents, fully corroborate said assertion.

Reply Affidavit of Robert J. Carroll

Insofar as deponent's arrest is concerned the affidavit of Mr. Newbrand, who was the only Secret Service Agent who arrested deponent, is barren of any reference to said arrest and barren of any claim that he had an arrest warrant when he arrested deponent. As a matter of fact Mr. Newbrand's affidavit very adroitly avoids the mention of the arrest and deals solely with his search of the premises of the Sheba Bracelets, Inc.

The only affidavit which makes the slightest reference to the subject matter of the arrest warrant is the affidavit of Mr. Sweeney. However, Mr. Sweeney was not the arresting officer, was not present when the arrest was made, and even he does not state that the warrant for deponent's arrest was actually issued, but that it was only "authorized" by Mr. Kaplan. The very fact that he himself states, in paragraph 3 of his affidavit, that "Mr. Kaplan was waiting for the Commissioner" clearly indicates that such warrant was not actually issued at the time.

Deponent is informed by his attorney that an Assistant United States Attorney has no power to authorize the issuance of an arrest warrant and that such arrest warrant can only be issued by a Judge or a Commissioner.

Insofar as the search warrant is concerned, Mr. Sweeney admits, in paragraph marked 2 of his affidavit, that no search warrant was even applied for as against Sheba Bracelets, Inc., or deponent and that the only search warrant applied for was the warrant for Mr. Diamant's premises at No. 10 West 47th Street, New York City. The affidavit of Mr. Newbrand, who actually searched the premises of the Sheba Bracelets, Inc., does not state that the search was made on the basis of any search warrant. Since Mr. Newbrand cannot support the search he made of the premises of the Sheba Bracelets, Inc., on September 28, 1951, by the existence of a search warrant, he endeavors to justify said search by a consent allegedly given by one

Mr. Adler, who was a foreman of the Carroll Instrument Co. Deponent is informed by his attorney that any consent given by said Mr. Adler is not binding upon deponent and the Sheba Bracelets, Inc., inasmuch as Mr. Adler did not work for Sheba Bracelets, Inc., but for the Carroll Instrument Company and that the defendants' constitutional privilege against an illegal search and seizure could not be waived by Mr. Adler.

It appears further from the affidavit of Mr. Newbrand that several books and records were removed by him in connection with the search of the premises. However, no receipt was given for those books and records and even Mr. Newbrand does not assert that such a receipt was given. Deponent is informed by his attorney that Mr. Newbrand had the duty to issue such a receipt and that his failure so to do makes the instant motion, under all of the circumstances, timely although said motion was made only during the trial.

The affidavit of Mr. Sweeney is replete with immaterial facts which deponent feels do not warrant any reply insofar as the instant motion is concerned. However, deponent desires to reiterate that he was not questioned for only one and a half hours but for the entire day, when he was arrested. On several occasions deponent had asked Mr. Sweeney for permission to use the telephone to contact his family but Mr. Sweeney refused such permission and told deponent that he could use the telephone in the jail. When Mr. Sweeney brought deponent to the Detention House deponent immediately asked for a telephone and was advised, in the presence of Mr. Sweeney, that he could not use the telephone. Thereupon deponent asked Mr. Sweeney to call his brother-in-law, Eugene Nadelman, and that is the sole reason why Mr. Sweeney made the telephone call to Mr. Nadelman, as referred to in the paragraph marked 10 of his affidavit. As a matter of fact deponent

is informed that Mr. Sweeney did not speak to his brother-in-law but to his nephew.

Although Mr. Nadelman was present at the arraignment of deponent, he did not represent him and never filed any notice of appearance in this proceeding, but was present only as a member of deponent's family.

The affidavit of Mr. Braun, insofar as it deals with events which took place in July of 1951, to wit, two months prior to deponent's arrest in the instant proceeding, is entirely immaterial. However, said affidavit shows that the examination of deponent's books in July, 1951, indicated that there were no irregularities since the Government returned those books to deponent and no proceedings were instituted against him.

The affidavit of Mr. Sikoff (referred to in deponent's main affidavit and in the affidavit of Mr. Boller as Mr. Sitkoff) entirely corroborates deponent's statement made in his main affidavit that Mr. Sikoff requested the records of the Sheba Bracelets, Inc., *in connection with an income tax examination.* Deponent had asked Mr. Sikoff for a receipt for those books and records but Mr. Sikoff refused to give deponent such receipt. Furthermore, as deponent stated in his main affidavit, Mr. Sikoff had promised deponent that he would return those books in a very short time and the affidavit of Mr. Sikoff shows that he did not keep such promise but that he had turned over those records to Special Agent Hyman L. Boller on October 28, 1954.

Mr. Boller, in his affidavit, states that he had *borrowed* from Mr. Sikoff the following corporate records of Sheba Bracelets, Inc.: "Cash Disbursements book, cash receipts and purchase book, accounts receivable and payable ledger, general journal, and miscellaneous sales and purchase invoices"; that in addition to those books deponent had given him bank statements on May 12, 1955, and that all of the

foregoing books and records were turned over by him to United States Attorney Robert K. Ruskin, at his request, on May 31, 1956 (paragraphs numbered 2, 3 and 4).

There are submitted herewith photostats of the receipt dated May 12, 1955, which deponent had received from Mr. Boller for the aforesaid bank statements of the Sheba Bracelets, Inc., for the years 1949, 1950 and 1951, as well as the receipts dated June 27, 1955 and February 16, 1956, which latter receipts were given to deponent for other papers and data turned over to Mr. Boller. All of said receipts show conclusively that Mr. Boller had *borrowed* the aforesaid documents from deponent and had promised to return them. Instead of doing so Mr. Boller turned the documents which he had *borrowed* from deponent and the documents which he had concededly borrowed from Mr. Sikoff to Mr. Ruskin without any authority in law or fact. The fact that the receipts given by Mr. Boller show that the documents in question were *borrowed* by Mr. Boller and were to be returned to deponent entirely corroborates deponent's statement that Mr. Sikoff had made the same promise to deponent although he had refused to give him a receipt.

Neither was Mr. Sikoff authorized to turn over the books he had received from deponent to Mr. Boller nor was Mr. Boller authorized to turn over those books, together with the books received by him directly, to the United States Attorney.

Deponent is informed that aside from the illegal arrest of deponent and the illegal search of the premises, the obtaining of said documents from deponent under a subterfuge and the turning over of all of the documents to the United States Attorney's office come squarely within the prohibition against unreasonable search and seizure contained in the Fourth Amendment to the Constitution.

WHEREFORE, deponent respectfully prays that the motion made pursuant to Rule 41 be, in all respects, granted.

ROBERT J. CARROLL.

(Sworn to on September 20, 1956.)

Receipt, Dated May 12, 1955, Annexed to Reply Affidavit of Robert J. Carroll

5/12/55

Borrowed from Robert J. Carroll—Bank Statements of Sheba Bracelets Inc. for 1949, 1950 & 1951.

These have been submitted voluntarily and are to be returned

HYMAN L. BOLLER
Special Agent

Receipt, Dated June 27, 1955, Annexed to Reply Affidavit of Robert J. Carroll

6/27/55

Borrowed from Robert J. Carroll, cancelled checks, bank statements and check stubs for the years 1951 and 1952.

These have been submitted voluntarily and are to be returned.

HYMAN L. BOLLER
Special Agent

Receipt, Dated February 16, 1956, Annexed to Reply Affidavit of Robert J. Carroll

Feb 16, 1956

Borrowed from Robert J. Carroll, the file of the case of R. J. Carroll vs Popper Watch Co Inc.

This file was submitted voluntarily and is to be returned.

HYMAN L. BOLLER
Special Agent

Reply Affidavit of Archibald Palmer, Read in Support of Motion to Suppress

(Record pp. 1142-1145)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

CITY OF NEW YORK
COUNTY OF NEW YORK } ss.:
STATE OF NEW YORK

ARCHIBALD PALMER, being duly sworn; deposes and says:

This affidavit is being submitted in reply to the affidavit of United States Attorney Robert K. Ruskin submitted in opposition to the motion made pursuant to Rule 41 of the Rules of Criminal Procedure.

It is unfortunate that Mr. Ruskin, in his affidavit, seeks to becloud the issue which has been raised as to the illegal

manner in which the documents in this case were obtained by referring to a statement allegedly made by deponent in court prior to the trial and to conversations between Mr. Ruskin and deponent.

In the first place, deponent denies that he ever discussed with Mr. Ruskin the illegal manner in which documents of the Sheba Bracelets, Inc., were obtained in this case. As a matter of fact, deponent's discussions with Mr. Ruskin were confined to a request for the return of certain personal items which were taken from the person of Mr. Carroll at the time of his arrest, which documents have no relevancy to this motion or to the trial of this action.

Deponent had no information before the trial as to whether the defendant Carroll was arrested with or without a warrant. The United States Attorney at no time before the trial furnished such information either to deponent or to the defendant Carroll. Neither did the defendant Carroll ever inform deponent that he had been arrested without a warrant. Nor did deponent have any way of knowing, before the trial, whether the seizure of the records at the place of business of Sheba Bracelets, Inc., was with or without a warrant, and the United States Attorney never informed deponent, prior to the trial, whether the records were seized with or without a warrant, and the defendant had never given any information to deponent to show whether or not any of the records were seized with or without a warrant.

As a matter of fact, the information that the defendant Carroll was arrested without a warrant and that the search for the records and seizure thereof were made without a warrant was elicited during the course of the trial after searching cross-examination of the Government witnesses by deponent. At no time did the Government state that the arrest or the search and seizure were without warrants.

Reply Affidavit of Archibald Palmer

Without conceding that deponent made the statement before the Court on June 15, 1956, appearing in paragraph marked 8 of the affidavit of Robert K. Ruskin dated September 18, 1956, the Court's attention is called to the fact that that alleged statement relates only to a seizure of the defendant Carroll and in no wise relates to the search of the premises of the Sheba Bracelets, Inc., and to the seizure of records of the corporation and of the defendant Carroll without a warrant.

It must not be overlooked that the gravamen of the question is the illegal search and seizure of the books and records.

Aside from the foregoing, it is important to call the attention of this Court to the following facts:

The arrest of the defendant Carroll was made in September of 1951. The indictment was handed down on August 25, 1952. This case was not moved for trial until the latter part of May, 1956.

Deponent had filed an appearance in this matter on June 15, 1956, after appearing before Judge McGohey at Judge McGohey's request, and at that time informed the Court of his business engagement in Mexico. Deponent up to that time had not been retained by the defendant and had no reason for preparing the case for trial and any statement that deponent may have made on June 15, 1956, was only based upon information which had been furnished to the effect that personal papers had been taken from the person of the defendant Carroll when he was in custody of the United States Secret Service Agents at No. 90 Church Street.

Deponent at that time did not know that the defendant Carroll had been arrested without a warrant or that a search of the premises of the Sheba Bracelets, Inc., had been made without a search warrant or that any papers had been seized belonging to the Sheba Bracelets, Inc.,

without a search warrant. Nor did deponent have any knowledge of the nature of the books and records kept by Sheba Bracelets, Inc., in connection with the operation of its business.

Deponent is of the opinion that he was not in a position to make any motion with respect to the arrest without a warrant or the search and seizure without a warrant until he actually came into possession of facts pointing to such arrest and seizure without a warrant during the course of the trial.

In conclusion, deponent wishes to state that he was unable to make a motion pursuant to Rule 41 prior to the trial since it was only ascertained during the trial that the defendant was arrested without a warrant and that the premises of the Sheba Bracelets, Inc., were searched without a search warrant.

ARCHIBALD PALMER.

(Sworn to September 20, 1956.)

Opinion

UNITED STATES DISTRICT COURT

(Record pp. 1181-1196)

SOUTHERN DISTRICT OF NEW YORK

Crime 139-165

—o—

UNITED STATES OF AMERICA

against

ROBERT J. CARROLL and SHEBA BRACELETS, INC.,
Defendants.

—o—

APPEARANCES:

HON. PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, Attorney for United States of America; ROBERT K. RUSKIN, Esq., Assistant United States Attorney, of Counsel.

PALMER, MASIA & PALMER, Esqs., Attorneys for Defendants Robert J. Carroll and Sheba Bracelets, Inc., 320 Broadway, New York 7 New York: ARCHIBALD PALMER, Esq., of Counsel.

PALMIERI, *D. J.*

In August, 1952, a grand jury brought an indictment, charging Sheba Bracelets, Inc., Robert Carroll, Samuel Diamant, Louis Fisher and Emil Popper with conspiring to use and acquire gold so as to violate the gold laws. 40 Stat. 415 (1917), as amended, 55 Stat. 839 (1941), 12 U. S. C.

5(a), (1952), Exec. Order No. 6260 (1933), as amended, Exec. Order No. 6560 (1934).[1] It also charged Sheba

[1] Section 95(a) provides:

"(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities.

* * *

any person, or with respect to any property, subject to the jurisdiction of the United States; * * * and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, * * * and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

"(3) * * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association, or corporation."

Executive Order No. 6260 provides:

"* * *

"Sec. 4. Acquisition of Gold Coin and Gold Bullion.—No person other than a Federal Reserve bank shall after the date of this

Bracelets Inc. and Carroll with two substantively different misrepresentations made on five different occasions on end-use certificates for semi-processed gold, in violation of 62

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order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive Order, provided that member banks of the Federal Reserve system may accept delivery of such coin, bullion, and certificates for surrender promptly to a Federal Reserve bank, and provided further that persons requiring gold for use in the industry, profession, or art in which they are regularly engaged may replenish their stocks of gold up to an aggregate amount of $100, by acquisitions of gold bullion held under licenses issued under section 5(b), without necessity of obtaining a license for such acquisitions. * * *

* * * *

"(c) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art, by an applicant regularly engaged in such industry, profession, or art, or in the business of furnishing gold therefor.

* * * *

"Sec. 5. Holding of gold coin, gold bullion, and gold certificates.—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order. * * *

"The Secretary of the Treasury, subject to such further regulations as he may prescribe, shall issue licenses authorizing the holding of—

* * * *

"(b) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art by a person regularly engaged in such industry, profession, or art or in the business of furnishing gold therefor; * * *"

Stat. 749 (1948), 18 U. S. C. 1001 (1952).[2] In 1956, the Government severed its case with respect to Popper and Diamant and with respect to misrepresentations made on three of the above dates. In September of this year the trial began before me.

At the end of the Government's case, it moved to dismiss against the defendant Fisher. This motion was granted. Defendants Carroll and Sheba Bracelets, Inc., (Sheba) then made motions to dismiss the conspiracy count for the reason that the Government had not proved anyone to be conspiring with Carroll, to strike the counts charging misrepresentation for being duplicitous, to suppress the bulk of the Government's evidence on the ground that it stemmed from an illegal search and seizure, and to dismiss all the counts for insufficiency of evidence. I believe that defendants have merit on only the conspiracy count, and, therefore, only this motion will be granted.

I. Conspiracy

The evidence has failed to reveal the ownership of Sheba Bracelets, Inc. Because of its dominance by Carroll, and because of the absence of evidence inculpating anybody else in the corporation, a conspiracy, if it is to be found, must be found between the defendant Carroll and the business institution he used to carry out his purposes. Such a finding, it seems, would over-extend the fiction of corporate personality.

---

[2] Section 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

It is true that corporations often have been held to be parties to a conspiracy. *E.g.*, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 939 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947); *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823 (C. C. S. D. N. Y. 1906), writ of error dismissed, 212 U. S. 585 (1908). However, in all such cases, one corporation had been in concert with another or with individuals who were not members of the corporation. *Cf. Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, *supra* (affiliated corporations under common ownership and control but holding themselves out as competitors); *United States* v. *Yellow Cab Co.*, *supra* (same). The rule does not extend to situations similar to the facts at hand. In *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir. 1952), *cert. den.*, 345 U. S. 925 (1953), the Government brought an action for treble damages under section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U. S. C. 1 (1952), in which it charged a corporation with conspiring with its officers, employees, representatives and agents to restrain trade. The court dismissed the action, holding that the acts and states of mind of the corporate agents were imputed to the corporation and that a corporation could not conspire with itself. See also *Lockwood Grader Corp.* v. *Bockhaus*, 129 Colo. 339, 270 P. 2d 193 (1954) (Civil conspiracy—two corporations and an agent cannot be conspirators where the agent is the sole actor for the two corporations); *United States* v. *Santa Rita Store Co.*, 16 N. Mex. 3, 113 Pac. 620 (1911) (criminal conspiracy—same). But *cf. State* v. *Parker*, 114 Conn. 354, 158 Atl. 797 (1932) (conspiracy to commit fraud among three directors and their corporation); *Potter Press* v. *C. W. Potter, Inc.*, 303 Mass. 485, 22 N. E. 2d 68 (1939) (same, conspiracy to compete unfairly).

The purpose behind not merging conspiracy into a completed crime, as happens with attempts, is separately to

penalize and to deter criminal organization, an evil quite apart from the substantive delicts which more likely than not result from such organization. This purpose is served by holding combinations of corporations, and often combinations of directors of one corporation, guilty of conspiracy. *Cf. Nelson Radio & Supply Co. v. Motorola, Inc., supra* (delict is combination of businesses, not combination of officers of one business). However, the policy does not apply when one man uses a corporate form to carry out his crime. There is no organization and no one other than the sole criminal to deter or to punish. In effect, a man would be more severely punished if he chose to commit his crime by using a corporate form than he would be if he committed it through another business device. If the Government's theory were valid, it would mean that any individual corporate officer, who committed an illegal act within the framework of his corporate duties, also conspired with the corporation to commit that act. I have found no support for such an assertion and neither counsel has cited any. On the contrary, the traditional understanding of the term "conspiracy" repels such a notion.

This reasoning is particularly true in the case at hand. The Government failed to prove the conspiratorial web among the principals; therefore, it seeks to accomplish the same purpose by breathing life and purpose, and thereby creating the requisite independent personality, into an institution manipulated solely by the individual from whom independence is required for criminality. This, the prosecution cannot do and it must fail on this count.

II. Duplicity

The two different types of misrepresentations, charged by the grand jury, are as follows: Defendants stated (a) that the industry, profession or art in which they were engaged requiring the use of gold was manufacturing

jewelry, and (b) that the gold which was sold to Sheba Bracelets, Inc. as a result of the above representation would be used by it in the industry, profession or art in which it was regularly engaged. Each of these alleged misrepresentations forms a separate count, and since end-use certificates on two dates are in question, four counts are involved.

I believe that the counts are not duplicitous. Sheba might have been regularly engaged in jewelry manufacturing and yet have acquired gold at a particular date for a purpose other than use in the profession, industry or art in which it was regularly engaged. The converse might also be true. *Cf. United States* v. *Michelson*, 165 F. 2d 732 (2d Cir.), *aff'd*, 335 U. S. 469 (1948) (to "offer" a bribe is a different crime from to "give" a bribe where statute reads, "Whoever shall promise, offer, or give, * * * any money * * * "). The instant statute is sufficiently broad to have each misrepresentation stand as a separate crime (see footnote 2, *supra*).

III. Search and Seizure

Both parties have submitted briefs and affidavits on this issue. I accept the Government affidavits, as mentioned below, as a reliable account of what transpired.

Defendant complains that certain papers were seized and statements taken pursuant to an unauthorized arrest. He further complains that he was kept incommunicado and lengthily questioned between his arrest and arraignment, but not only does this charge lack substantiation, but, as far as I can see, the Government gained nothing from this questioning. The Government attests that no aid to its case resulted from these papers, and since defendant does not indicate anything to the contrary, indeed does not disclose what papers were taken, this part of defendant's motion is denied.

The statement taken, which was introduced in evidence, was to the effect that defendant would not say anything about the gold in which he allegedly was dealing for fear of implicating other people. This was an admission against interest, and since it was made well before Carroll could have been illegally detained, assuming for the moment that he was detained, it is admissible whether or not the arrest was legal. *Cf. United States* v. *Carignan*, 342 U. S. 36 (1951); *United States* v. *Mitchell*, 322 U. S. 65 (1944); *United States* v. *Leviton*, 193 F. 2d 848 (1951), *cert. den.* 343 U. S. 946 (1952) ("subsequent illegality cannot make invalid an already competent confession", at 853); 3 Wigmore on Evidence 851 (1940). The federal policy against admitting confessions procured by illegal detentions is not applicable here. *Cf. McNabb* v. *United States*, 318 U. S. 332 (1943); *Leyra* v. *Denno*, 347 U. S. 556 (1954).

Defendant Carroll also complains that soon after his arrest, federal agents conducted, without a warrant, a search of the premises of Sheba Bracelets, Inc. and seized several papers. (According to Government affidavits, three sales invoice tablets, several Post Office Department return receipt cards and several cancelled checks were taken.) He also complains that books and records of Sheba Bracelets, Inc., which were voluntarily turned over to the Internal Revenue Service in connection with a tax examination, were transferred to the United States Attorney prosecuting this case without Sheba's permission and hence illegally used by the Government.

While it is not clear whether or not defendant corporation, in addition to defendant Carroll, is raising this objection, I will treat the motion as if it were raised separately by both parties. With respect to defendant Carroll, the motion lacks merit. It has been held that a corporate officer or stockholder, even if he is the sole officer and stockholder, is not the proper party to raise any corporate right

against an illegal search or seizure. *E.g.*, *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.), *cert. den.*, 331 U. S. 858 (1946); *United States* v. *American Stevedores, Inc.*, 16 F. R. D. 164 (S. D. N. Y. 1954).

As far as Sheba Bracelets, Inc. is concerned, it is quite clear that it cannot shield itself behind the Fifth Amendment, for this guarantee is not applicable to corporations. *E. g.*, *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186 (1946); *United States* v. *White*, 322 U. S. 694 (1944); *Hale* v. *Henkel*, *supra*. However, it is not clear whether or not corporations have any right under the Fourth Amendment. Many cases have held that the right of privacy under the Fourth Amendment is much less substantial for corporations, if they have such a right at all, than it is for individuals. *E.g.*, *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950); *Oklahoma Press Pub. Co.* v. *Walling*, *supra*; *Hale* v. *Henkel*, *supra*. The cases stress the general requirement that corporations keep books and records and have them open for governmental inspection whether or not the proper governmental agency has a search warrant. The reason given for this view is the theory that corporations are creations of the state and that they are endowed with public attributes. See cases cited immediately supra. Corporate books and records are even more subject to governmental scrutiny, it would appear, when they are explicitly made so by legislation, as is the case here. See 31 C. F. R. 54.26 (1949, as amended, 1954); *Davis* v. *United States*, 328 U. S. 582 (1946); *Wilson* v. *United States*, 221 U. S. 361, 380-81 (1911); *Boules* v. *Insel*, 148 F. 2d 91 (3d Cir. 1945). But see *United States* v. *Lagow*, 66 F. Supp. 738 (S. D. N. Y.), *aff'd*, 159 F. 2d 245 (2d Cir.), *cert. den.*, 331 U. S. 858 (1946).

Nevertheless, the Government should have proceeded by obtaining a subpoena. Its failure to do so, however, should not vitiate the information it acquired from the

corporate books and records. Jurisdiction in the Treasury agents was clear, 31 C. F. R. 54.26, *supra*, the inspection was not of countless business papers and of an oppressive type, and probable cause, as for a search warrant, need not have been shown. See *United States* v. *Morton Salt Co.*, *supra*; *Boules* v. *Insel*, *supra*; *cf. FTC* v. *American Tobacco Co.*, 264 U. S. 298 (1924) (dragnet and oppressive search, distinguished by *United States* v. *Morton Salt Co.*, *supra*, at 652); *Gouled* v. *United States*, 255 U. S. 298 (1921) (search warrant used to explore private home for evidence, explained by *Davis* v. *United States*, *supra*, dissenting opinion at 612); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1919) (subpoena of corporate records vitiated by earlier dragnet and oppressive search and seizure against individual); *Takahashi* v. *United States*, 143 F. 2d 118 (9th Cir. 1944) (articles seized not contrabrand articles within meaning of statute authorizing search for same); *United States* v. *Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1953) (permission given to Internal Revenue Service to investigate files and statements given to it not a consent to allow agents the right to conduct a thorough search to gather evidence for proposed tax fraud prosecution). The last case, relied on rather heavily by the defendant, is further distinguished by a subsequent opinion in the case, written by the same judge after reargument. 126 F. Supp. 609 (1955). The Court held that a consent to a civil tax investigation was *prima facie* a consent to a criminal tax investigation. See *Scanlon* v. *United States*, 223 F. 2d 382 (1st Cir. 1955); *United States* v. *Wolrich*, 119 F. Supp. 538 (S. D. N. Y. 1954). But see *United States* v. *Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955) (reargument:—consent, which was necessary for examination, obtained by fraud). But whichever of the *Guerrina* opinions is law does not matter here, for the Government is proceeding by legislative authority, not

individual consent.[3] This does not mean that the Government has the right to retain the books and records, for the regulation, cited above, authorizes only inspection. However, since the Government could not have gleaned any more information than that derivable from an examination, and since defendant does not seem to be, and does not claim to be prejudiced, in preparing his defense from their custody by the Government, the fact that there was a seizure, as distinguished from a search, does not seem to be significant.

Thus, it would seem, the defendants' motion to suppress should also be denied with respect to the corporate books and records. It may be, however, that the reasoning above does not apply to the items seized by the Government at the time of inspecting the premises of Sheba, at least with respect to Sheba Bracelets, Inc. These matters, unlike the books and records, are not the normal matters in which a Treasury agent would be interested. But it is unnecessary to decide whether or not the search and seizure as to these items were reasonable, for there appears to have been a waiver by Sheba of its constitutional right.

There is no dispute that defendant Carroll knew about the taking of these objects five years before this trial began. Furthermore, he was apprised well before the trial began of the transfer of the books and records from the Internal Revenue Service to the United States Attorney's Office. Since Carroll is an officer of, indeed, the most active force behind, Sheba Bracelets, Inc., his knowledge is imputed to the corporation. The only question is whether or not Carroll was aware of the grounds for the motion. See F. R. Crim. P. 41(e). There is a conflict in the affidavits as to

[3] The theory is that the defendant, by taking out a gold license, assented to the search provisions of the gold statutes and regulations. *Cf. Shapiro* v. *United States*, 1948, 335 U. S. 1, 32-33; *Zap* v. *United States*, 1946, 328 U. S. 624.

whether or not defendants' lawyer, Mr. Palmer, knew that evidence was taken from Sheba. It is clear, however, that Mr. Palmer knew of papers taken from the person of Carroll at the time of the arrest. Moreover, Mr. Palmer's statements before Judge Levet suggest that he had knowledge of the papers, books and records in the hands of the United States Attorney. Thus, it would seem that defendant Sheba was aware of the grounds of the motion. Since I believe that it would not further substantial justice to allow a motion to suppress this evidence in the midst of the trial, I deny this part of the motion.

The motion to suppress is denied.

IV. Sufficiency of Evidence

I believe that there is sufficient evidence in the case to warrant submitting the counts charging misrepresentation to the jury.

In brief, the evidence inculpating Carroll is testimony that the jewelry manufacturing machines were thoroughly dirty and full of cob-webs, that a worker on the premises never saw them in operation during the working day, that the owners of Sheba Bracelets, Inc. did not spend much time in the office, and that despite this seeming inactivity almost $535,000 worth of gold in almost daily purchases of approximately 150 ounces of gold was bought between April 2, 1951 and September 27, 1951, a period of six months.

Furthermore, the prosecution introduced evidence from which the jury can infer that a supposedly very active customer, indeed, apparently the only customer over approximately a six-month period, was non-existent.

There are no rigid formulas for examining a case of circumstantial evidence. See *Holland* v. *United States*, 348 U. S. 121 (1954); *United States* v. *Valenti*, 134 F. 2d 362 (2d Cir.), *cert. den.*, 319 U. S. 761 (1943); *United States* v. *Becker*, 62 F. 2d 1007 (2d Cir. 1933); Note, Sufficiency of

Circumstantial Evidence in a Criminal Case, 55 Col. L. Rev. 549 (1955). Enough has been shown in this case to warrant a submission to the jury.

The motion to dismiss the conspiracy count is granted.

The motions charging duplicity, illegal search and seizure, and insufficiency of evidence are denied.

Dated: September 21, 1956.

EDMUND L. PALMIERI.

Judgment

(Record page 1198)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 139-165

UNITED STATES OF AMERICA

v.

ROBERT J. CARROLL

On this 23rd day of October, 1956 came the attorney for the government and the defendant appeared in person and [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty by a jury of the offense of in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make false, fictitious and fraudulent statements and representations in "END-USE CERTIFICATES FOR SEMI-PROCESSED GOLD". (Title 18, Sec. 1001, USC.) as charged [3]

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the righ to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

in counts 2-3-10 and 11 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] EIGHTEEN (18) MONTHS on each of counts 2-3-10 and 11 to run concurrently with each other and fined $5000 to cover all four counts. Defendant to stand committed until fine is paid or he is otherwise discharged according to law.

Defendant continued on bail of $15,000 pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDMUND L. PALMIERI,
United States District Judge.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

Judgment

(Record page 1197)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 139-165

—o—

UNITED STATES OF AMERICA

v.

SHEBA BRACELETS, INC.

—o—

On this 23rd day of October, 1956 came the attorney for the government and the defendant appeared [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon its plea of [2] not guilty by Robert J. Carroll, Treasurer, and a verdict of guilty by a jury, of the offense of in a matter within the jurisdiction of the Office of the Director of the Mint, United States Treasury Department, did unlawfully, knowingly and wilfully make false, fictitious and fraudulent statements and representations in "END-USE CERTIFICATES FOR SEMI-PROCESSED GOLD". (Title 18, Sec. 1001, USC.) as charged [3] in counts 2-3-10 and 11

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

Judgment *

and the court having asked the defendant whether it has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby
$5000 to cover counts 2-3-10 and 11.

EDMUND L. PALMIERI,
United States District Judge.

* Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

Notice of Appeal

(Record pp. 1199-1202)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Names and Addresses of Appellants:
Sheba Bracelets, Inc.
Robert J. Carroll
3857 Kings Highway
Brooklyn 34 New York

Name and address of Appellants' attorneys:
Palmer, Masia & Palmer
320 Broadway
New York 7 New York

Offense
Violation of Section 1001, Title 18, U. S. Code, referred to in Counts Two, Three, Ten and Eleven of the indictment

Date of judgment:
October 23, 1956

Brief description of judgment and sentence:
As to Defendant-Appellant Sheba Bracelets, Inc.:
Fine of $5,000.00 to cover Counts Two, Three, Ten and Eleven of the indictment:

As to Defendant-Appellant Robert J. Carroll:
Sentenced to eighteen months' confinement at a place to be designated by the Attorney General on each

of the counts, to wit, Counts Two, Three, Ten and Eleven, to run concurrently, and a fine of $5,000.00 to cover said Counts Two, Three, Ten and Eleven, the said defendant-appellant to stand committed until the fine is paid, or is otherwise discharged according to law.

Dated, New York, October 24, 1956

SHEBA BRACELETS, INC.
By ROBERT J. CARROLL
Treasurer

GROUNDS OF APPEAL

1. The Court erred in denying appellant's motion to dismiss Counts Two, Three, Ten and Eleven of the indictment as fatally defective, in that the indictment charged, in four counts, a continued crime which should have been charged in one count, and charged the same offense in a multiplicity of counts, in violation of the Fifth Amendment to the Constitution of the United States.

2. The Court erred in denying the appellants' motion to suppress evidence obtained by the Government without a warrant of arrest and without a search warrant, made pursuant to Rule 41 of the Federal Rules of Criminal Procedure.

3. The Court erred in denying appellants' motion to suppress certain evidence which was obtained by the United States Attorney from the Internal Revenue Service without a search warrant and without subpoena.

4. That the denial of the motion referred to in the grounds numbered 2 and 3 hereof violated the appellants' constitutional privilege against unreasonable search and seizure, as referred to in the Fourth Amendment to the Constitution of the United States.

5. The Court erred in denying appellants' motion to dismiss the indictment at the close of the Government's case on the ground that the Government failed to adduce proof sufficient to establish the commission of any crime by appellants.

6. The Court erred in denying appellants' motion to dismiss the indictment, at the close of the Government's case, upon the ground that the Government failed to adduce proof sufficient to establish the commission of a crime beyond a reasonable doubt.

7. The Court erred in denying appellants' motion for a directed verdict of not guilty upon the ground that there was no evidence in the case upon which the jury could find that appellants had committed any crime.

8. The Court erred in denying appellants' motion, made after the verdict, to set aside the verdict of guilty, against the appellants, for a new trial, and for an arrest of judgment, upon the ground that the verdict was contrary to the evidence, contrary to law, and against the weight of evidence.

9. That the appellants were denied a speedy trial, in violation of the Sixth Amendment to the constitution, in that the indictment was handed down on August 25, 1952, and the case was brought to trial approximately four (4) years later and the delay in bringing the case to trial was caused by deliberate act of the Government.

10. The verdict of guilty against the appellants is contrary to law.

11 The Court erred in denying numerous motions to withdraw a juror and for a mistrial.

12. The Court erred in various rulings on the receipt and exclusion of evidence, particularly the receipt of the

evidence which had been obtained by the Government without a warrant of arrest, without a search warrant, and in violation of the unreasonable search and seizure clause contained in the Fourth Amendment to the Constitution.

13. The appellants did not have a fair trial in that the United States Attorney, in his summation, was permitted by the Court to make inflammatory appeals to the passions of the jury, to the prejudice of the appellants.

14. The Court made various errors in charging the jury, particularly in failing to charge the jury in connection with the elements of the crime, the duty of the Government to prove each and every element of the crime beyond a reasonable doubt, and many other matters affecting substantial rights of the appellants, as requested by the appellants.

SHEBA BRACELETS, INC.
By ROBERT J. CARROLL
Treasurer
ROBERT J. CARROLL
Robert J. Carroll

PALMER, MASIA & PALMER.
By ARCHIBALD PALMER,
Attys. for Appellants,
Office & P. O. Address,
No. 329 Broadway,
Borough of Manhattan,
New York 7, New York.

JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 556

SHEBA BRACELETS, INC., and ROBERT J. CARROLL,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARCHIBALD PALMER,
Attorney for Petitioners.

PALMER, MASIA & PALMER,
of Counsel.

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Supreme Court of the United States

October Term, 1957

No.

SHEBA BRACELETS, INC., and ROBERT J. CARROLL,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed their conviction for violations of Section 1001, Title 18 U. S. C., upon four counts of the indictment.

(a) The Opinions Below.

The opinion of the District Court with respect to various motions is officially reported in 144 Fed. Supp. 939. The opinion of the Court below has not yet been officially reported; a copy thereof is hereto annexed as an appendix.

(b) Statement of Grounds of Jurisdiction.

1. The judgment of the Court of Appeals was rendered and entered on August 14, 1957.

2. Timely application for rehearing was made on August 29, 1957, and was denied on September 18, 1957.

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. C., Rule 37, and 28 U. S. C., § 1254.

(c) Questions Presented for Review.

1. Whether Rule 41 (e) of the Federal Rules of Criminal Procedure should be limited to evidence obtained in violation of the provisions of the Fourth Amendment to the Constitution or, despite the clear language of said rule, it should be extended to evidence obtained in violation of a statutory right, as included in Section 7213 (a) of the 1954 Revenue Code, Section 1905 of Title 18, U. S. C., and obtained in violation of the express agreement made in good faith by a taxpayer and a government representative of the Tax Department and whether the Trial Court committed prejudicial error in overruling the objections to the introduction of such evidence and in denying a motion made during the trial to suppress such evidence.

2. Whether the immu[illegible]y of the defendants from an unlawful search and seizure and the constitutional right to receive a fair trial were violated by the courts below in applying Rule 41 (e) after the reason for the said rule was removed by the Trial Court in adjourning the case for one week to hear the motion to suppress the evidence alleged to have been illegally obtained in a situation where a period of almost five years elapsed between the date of the arrest, without a warrant, and the search and seizure without a warrant, and the date of trial, and almost four years elapsed between the date of the indictment and the date of trial, without the Government taking any action

to bring the case to trial until six days after having received the books and records of the defendants from a tax agent who borrowed same for the purpose of a tax examination with the express promise to return the same to the defendants.

3. Whether the right of the defendants to obtain a fair trial was violated by the conduct of the prosecution in making representations to the Court with respect to material facts and in failing to file an affidavit to support such representations as directed by the Court.

4. Whether the right to inspect the statements made by a government witness prior to trial, as established by this Court in *Jencks* v. *United States*, 77 Sup. Ct. 1107, may be taken away by the Court's finding that the testimony is consistent with said statements and whether an error in refusing to permit such inspection may be excused by application of the harmless error statute.

(d) Statutes and Rules Involved.

Title 18, United States Code, Section 1001. *Statements or Entries Generally.*

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 12, United States Code, Section 95(a). *Embargo on bullion or coin; hoarding; requirement of disclosure; penalties.*

> "(1) During the time of war or during any other period of national emergency declared by the Presi-

dent, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and * * *

Whoever willfully violates any of the provisions of this section or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both. As used in this section the term 'person' means an individual, partnership, association, or corporation. (Oct. 6, 1917, ch. 106, § 5(b), 40 Stat. 415; Sept. 24, 1918, ch. 176, § 5, 40 Stat. 966; Mar. 9, 1933, ch. 1, title I, § 2, 48 Stat. 1; May 7, 1940, ch. 185, § 1, 54 Stat. 179; Dec. 18, 1941, ch. 593, July 4, 1946, 11 F. R. 7517, 69 Stat. 1352)."
title III, § 301, 55 Stat. 839; Proc. No. 2695, eff.

Fourth Amendment to the United States Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rule 41(e) of Criminal Procedure

"(e) *Motion for Return of Property and To Suppress Evidence.*

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence any-

thing so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Title 26, United States Code, Section 7213. *Unauthorized disclosure of information.*

"(a) INCOME RETURNS.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, to-

gether with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Title 18, United States Code, Section 1905. *Disclosure of confidential information generally.*

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to identify, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, c. 645, 62 Stat. 791."

Section 54.25, Title 31, C. F. R. *Licenses.*

"(a) Upon receipt of the application and after making such investigation of the case as it may deem advisable, the mint, if satisfied that gold is necessary for the legitimate and customary requirements of the applicant's industry, profession, art, or business, shall issue to the applicant a license on form TGL-12, TGL-13, or TGL-14, whichever is designated in rulings of the Secretary of the Treasury for the kind of business, industry, profession, or art in which the applicant is engaged."

Section 54.26, Title 31, C. F. R. Records.

> "Every person holding a license issued pursuant to § 54.23 shall keep exact records of all his acquisitions and deliveries of gold. His records shall contain the name, address, and license number of each person from whom he acquires, or to whom he delivers, gold (other than fabricated gold) and shall show the amount, date, and description of each such acquisition and delivery, and such records shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold. If the person from whom such gold is acquired, or to whom such gold is delivered, does not have a license such records shall show, in lieu of the license number of such person, the section of the regulations in this part pursuant to which such gold was held or acquired by such person."

Sixth Amendment to the United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(e) Statement of Case.

The defendant Carroll was arrested without a warrant and a search of the premises of the defendant Sheba Bracelets, Inc., was made without a search warrant on September 28, 1951.

The indictment herein, filed on August 25, 1952, originally contained eleven counts, consisting of one conspiracy count charging petitioners and other defendants with con-

spiring to acquire and use gold so as to violate Section 95(a) of Title 12, U. S. Code, which was dismissed as to petitioners during the trial, and ten substantive counts, six of which were severed prior to trial, never tried and finally dismissed against the appellants. The remaining substantive counts, Two, Three, Ten and Eleven, charged the appellants with alleged misrepresentations in so-called End-Use Certificates executed by them in order to purchase semi-processed gold to be used in the manufacture of jewelry. The four counts relate to two separate certificates dated September 14, 1951 and September 28, 1951, respectively.

Counts Two and Three, which refer to the certificate of September 14, 1951, charge petitioners with having falsely represented that Sheba Bracelets, Inc., the corporate petitioner was regularly engaged in the manufacture of jewelry and that petitioners would use the gold sold to said corporate petitioner in the industry, profession or art in which the said corporation was regularly engaged. Counts Ten and Eleven make the same charges with respect to the End-Use Certificate made on September 28, 1951.

On May 31, 1956 an Internal Revenue Agent, who had previously received certain books and records from petitioners on the representation that they were being taken for a tax examination and on the express agreement to return same, violated said agreement and instead turned over the books and records of Sheba Bracelets, Inc. to the United States Attorney in charge of the instant prosecution without the knowledge or consent of petitioners. Although the case had been dormant for almost four years, the United States Attorney, on or about June 4, 1956, for the first time, pressed for a trial.

Up to June 13, 1956, petitioners were not represented by counsel and on June 14, 1956, counsel filed a notice of appearance and the case was adjourned over the summer, to September 11, 1956, when the trial began before Judge Palmieri and a jury (App. 3a).

It appears from the evidence adduced at the trial that for at least two years prior to April 1951 Sheba Bracelets, Inc., of which Carrol was an officer, had been licensed by the Treasury Department to manufacture, sell and trade in gold jewelry (R. 67; App. 19a).* Said licenses were issued by the Treasury Department after an investigation of the corporation had been made for the purpose of establishing that the corporation was engaged in the business of manufacturing jewelry (R. 74-76; App. 20a-22a). In April 1951 the End-Use Certificates, which required the purchaser of semi-processed gold to execute a certificate containing certain information, came into effect.

From April to September, 1951, the corporation bought various quantities of semi-processed gold from Kastenhuber & Lehrfeld, a licensed gold refiner, and executed, for such purpose, End-Use Certificates which were ultimately turned over to the Treasury Department (R. 171-177). The End-Use Certificates dated September 14, 1951 and September 28, 1951 are the subject matter of the instant proceedings. The material statements made by the appellants in those End-Use Certificates read as follows:

> "6. That the industry, profession or art requiring the use of gold in which he is regularly engaged is as follows:
>
> Manufacturing jeweler."

and

> "9. That the gold sold to him as a result of the representations made in this certificate will be:"

and the answer checked was:

> "Used by him in the industry, profession or art in which he is regularly engaged."

(Gov. Exs. 14, 15, 16).

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* Citations to the record on appeal filed in the Court below are indicated by prefix "R" and those to the petitioners' appendix are indicated by the prefix "App."

The gist of the charge was that the petitioners, who bought semi-processed gold from the Government and paid for same, did not use the gold in the manufacturing business. The prosecution endeavored to prove that instead the petitioners sold the semi-processed gold and, in that connection, relied upon inferences, speculations and innuendoes drawn from the testimony of an employee of Sheba Bracelets to the effect that the machinery of the corporation had not been used during the regular business hours (R. 224-256), from the testimony of a secret service agent to the effect that the machines at the premises of the corporation were dirty and dusty (R. 267) and that on several occasions he had followed Carroll from the place of business of Kastenhuber & Lehrfeld at No. 10 West 47th Street, New York City, where Samuel Diamant had a place of business, and on each of said occasions Carroll had a small package under his arm when he reached the premises No. 10 West 47th Street but left without such package (R. 270, 318, 436; App. 54a), and, finally, the testimony of one Joseph Magaraill, landlord of premises No. 721 Poplar Street, Philadelphia, Pa., to the effect that he did not know Frank Brooks, with whom, according to the books and records of the corporation, a substantial business in gold bracelets had been done (R. 450-455; App. 55a, 56a).

The prosecution apparently endeavored to leave the jury with the impression that Frank Brooks was a fictitious and non-existent person, although petitioners, as part of their case, called Joseph K. Pollack, Supervisor of the Bookkeeping Department of the First Pennsylvania Bank & Trust Company, of Philadelphia, who testified that Frank Brooks maintained a bank account with said bank from 1949 to 1951, which testimony clearly established that Frank Brooks was an existing person (App. 100a to 105a).

The name Frank Brooks was obtained from the books and records of Sheba Bracelets, Inc. These books and records were voluntarily turned over to the agents of the

Internal Revenue Service upon the express representation that they would be used for a tax examination and would thereafter be returned to petitioners but, in violation of said express agreement, the said books and records were, on May 31, 1956, turned over to the United States Attorney in charge of this case (App. 158a to 160a, 177a to 186a). Objection was made, on behalf of petitioners, to the introduction of these books and records in evidence (App. 33a, 34a) and a motion was made to suppress the evidence based upon these books and records, whereupon the Trial Judge adjourned the case so that a formal written motion could be made to suppress the books and records and the evidence based thereon (R. 658-660). Such motion was duly made (App. 159a ff.) and was denied (App. 198a).

Thereafter, and during the course of the trial, counsel for the petitioners endeavored to show that the information with respect to Frank Brooks was obtained from the books and records when they were turned over to the United States Attorney on May 31, 1956, and the United States Attorney made the representation to the Court that the information was obtained in July 1951, prior to the arrest, when Carroll voluntarily turned over the books to the Secret Service and the Audit Division, for their examination (R. 668, 689). However, counsel for the petitioners had objected to the statement of Mr. Ruskin because he was not in charge of the case in 1951 and first appeared in May, 1956. The Trial Court requested Mr. Ruskin to submit an affidavit of a person properly qualified to substantiate the facts as represented so that the same could be marked a court exhibit and made part of the record (R. 689, 690). No affidavit was ever filed by Mr. Ruskin in connection with said direction and there is no Court's Exhibit 8-A in existence as part of the record.

The trial resulted in a verdict of guilty against petitioners. The petitioner Sheba was fined $5,000 and the petitioner Carroll was sentenced to eighteen months on each

of the counts, to run concurrently, and fined $5,000. Upon appeal the judgments of the Trial Court were affirmed by the Court below. A timely application for rehearing was denied by the Court below.

(f) Jurisdiction of the Courts Below.

The District Court had jurisdiction under Title 26, U. S. C., Section 1001.

The Court of Appeals had jurisdiction under Title 28, U. S. C., Section 1291.

(g) Reasons Relied On.

As to Question 1:

Rule 41(e) should not have been extended by the Court to encompass a situation whereby the Government obtained the books from the Internal Revenue Service surrendered to it voluntarily for a tax investigation without the knowledge or consent, express or implied, of the taxpayer.

During the trial the Government offered in evidence books and records of Sheba Bracelets, Inc., obtained on May 31, 1956, from the Agents of the Internal Revenue Service. These books and records were voluntarily delivered to the agents by Carroll upon the representation that they were required for a tax examination and would be returned. No permission was requested of or consent given by Carroll for the delivery of the books and records to the United States Attorney.

These books contained entries of sales to one Frank Brooks of substantial quantities of gold bracelets. With these entries as a foundation the prosecution endeavored to establish that Frank Brooks was a fictitious and nonexistent person.

Objection was taken to the introduction of those books in evidence and subsequently a formal motion was made to suppress the evidence.

Petitioner Carroll, in his affidavit in support of the motion to suppress, stated that Agent Sikoff had told him that he wanted the books of Sheba Bracelets in connection with a tax investigation, which had nothing to do with the instant case, and promised that he would return those books in a few days or, at the most, in a week and, relying on said promise, he turned over to Mr. Sikoff the books and records (App. 159a). These statements are corroborated by the affidavit of Louis Sikoff, a Revenue Agent of the Internal Revenue Service attached to the Brooklyn office, who stated that the records of the corporation were requested from Carroll in connection with an income tax examination of the corporation then in progress and that he had turned the records over to Special Agent Boller, of the United States Internal Revenue Service (App. 177a, 178a). Agent Boller likewise made an affidavit stating that in connection with the official income tax investigation of Sheba Bracelets, Inc., he borrowed from Revenue Agent Sikoff the books and records of Sheba Bracelets and on May 31, 1956, turned over said books and records to Assistant United States Attorney Ruskin, at his request (App. 179a). Carroll's statement is also corroborated by receipts given for other records obtained from Sheba Bracelets, Inc., which appear at pages 185a and 186a of the appendix, signed by Agent Boller and expressly stating that the books had been voluntarily submitted and "are to be returned."

The Court of Appeals approved the denial of the motion to suppress by the Trial Judge solely upon the ground that the motion was made during the trial and not in advance of the trial, applying Rule 41(e) of the Federal Rules of Criminal Procedure.

One of petitioners' main contentions is that the delivery by the Revenue Agents of the books and records to Mr. Ruskin on May 31, 1956, on the eve of trial, was in violation of the express agreement and promise to return the books

to petitioners and in violation of Section 1905 of Title 18, U. S. Code, and Section 7213(a) of the 1954 Revenue Code, which had the effect of making it criminal for revenue agents to furnish the books to the United States Attorney for use by him in a criminal prosecution having nothing to do with taxes.

The Court of Appeals did not decide this fundamental issue on the merits but simply denied the motion to suppress for untimeliness.

Rule 41(e) of the Federal Rules of Criminal Procedure, by its express wording, is limited to evidence obtained by the Government by "search and seizure." The Court below, in its opinion, recognized that the manner in which the United States Attorney obtained the books from the Income Tax Bureau did not literally constitute a "search and seizure" of the sort described in Rule 41(e) but held that this Court and the Court of Appeals had extended the provisions of Rule 41(e) to situations other than "search and seizure."

We have been unable to find any case which takes the position adopted here by the Court of Appeals that Rule 41(e) may be extended to evidence obtained in violation of a statutory right or an agreement made in good faith by a taxpayer and a government official. On the contrary, two cases decided in the Second Circuit, one by the District Court and one by the Court of Appeals, stand for the proposition that Rule 41(e), except in wire-tap cases, should be strictly limited to evidence obtained in violation of a constitutional right.

In *United States* v. *T. Vincent Quinn et al.*, 17 F. R. D. 342, a motion was made to suppress certain books and records prior to the trial, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. Said books had been obtained by the government under exactly the same circumstances as prevail in the instant case. In that case too the taxpayer had turned over certain books and records to Internal Revenue Agents in connection with an investigation and said Internal Revenue Agents had turned over

said books to the United States Attorney. In the *Quinn* case, as in the instant case, those books were used in a prosecution of a matter entirely foreign to any tax matter and the only difference between the *Quinn* case and the instant case lies in the fact that the prosecution in that case was for a violation of Section 281, Title 18, U. S. C., while the instant case is for a violation of Section 1001, Title 18, U. S. C. Paradoxically, the motion in the *Quinn* case was denied as premature, as recently as April 26, 1955, and District Judge Bicks, in denying said motion, stated, at page 346, as follows:

> "Absent statutory provision or other compelling authority to the contrary, I am of the view that in criminal cases objections to the admissibility of evidence should not be passed upon in advance of trial."

As far as can be ascertained this was the only authority on the subject prior to the making of the motion by petitioners. Counsel for petitioners was entitled to rely on the *Quinn* case and had he made such a motion prior to the trial said motion would have been denied by the District Court as premature under the authority of the *Quinn* case.

The decision of the Court of Appeals in the instant case is not only in conflict with the decision in the *Quinn* case but is also in conflict with *In re Fried, et al.*, 161 Fed. (2d) 453, which was decided by the same Court of Appeals. The question presented in that case was whether Rule 41(e) of the Federal Rules of Criminal Procedure should be extended to motions to suppress a confession. The Court of Appeals in that case held that Rule 41(e) was applicable only where constitutional rights were violated but when evidence was not procured in violation of constitutional rights but was procured in such manner as to render it inadmissible at the trial, a confession should not be suppressed in advance of the trial.

Judge Learned Hand, in a concurring opinion in the *Fried* case, was even reluctant to apply Rule 41(e) to evidence obtained in violation of a constitutional right

other than immunity from unlawful search and seizure but definitely excluded the application of Rule 41(e) to the violation of a statutory right by stating, at page 465, as follows:

> "Nevertheless, I wish strictly to confine it to the violation of a constitutional right; and to accept it only because of the higher respect in which these are traditionally held. Were it inevitable that all the privileges of an accused should be treated alike, so far as my vote was concerned, I should compel the accused to postpone even a constitutional objection until the trial. I should choose to impose upon him whatever risk that might entail, rather than to hobble the prosecution of crime by mincing the trial into successive separate determinations."

Ordinarily objection to the admissibility of evidence must be determined when it is tendered at the trial and not in advance of trial. Rule 41(e), which expressly relates to unlawful search and seizure, is an exception to the general rule and should be strictly construed. If additional exceptions to the general rule are created by the courts then the exceptions will eventually become the rule and a defendant in a criminal case will no longer be permitted to make any objections to the introduction of evidence at the trial. It is respectfully submitted that by extending the application of Rule 41(e) to the instant situation the courts below have so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

As to Question 2:

The Court of Appeals stated that the manner in which the United States Attorney obtained the books from the Income Tax Bureau did not constitute a search and seizure of the sort described in Rule 41(e) and affirmed the denial of the motion to suppress solely upon the ground of untimeliness, avoiding a determination upon the merits. Regardless of whether the manner in which the United States

Attorney obtained the books literally constituted a search and seizure and assuming that Rule 41(e) were applicable to evidence obtained in violation of a statutory right and in violation of an agreement, the question whether the motion was timely became academic when the District Court adjourned the trial for one week for the purpose of receiving affidavits and considering the motion to suppress.

The Court of Appeals cited the case of *Nardone* v. *United States*, 308 U. S. 338, 341, 342, as authority in holding that the motion to suppress was untimely and quoted from that case as follows:

> "Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention."

If the District Court had refused to interrupt the trial for the purpose of the motion to suppress then there would have been no room for complaint on the part of petitioners with respect to a determination based upon the exercise of discretion, but the Trial Court, in its discretion having interrupted the trial for one week, it can no longer be argued that the motion to suppress should be denied as untimely since the reason for the application of Rule 41(e) had been removed by the action of the District Court, as permitted by said rule.

Moreover, petitioners could not obtain a fair trial if upon the facts of this case a motion to suppress evidence illegally and improperly obtained could be denied upon the ground of untimeliness. Rule 41(e) expressly states that the motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. The record shows that petitioners did not have an opportunity to make the motion

before the trial and that they could not have been aware of the grounds for the motion until after May 31, 1956, when the books and records were turned over to the United States Attorney by the agents of the Internal Revenue Service without the knowledge or consent of petitioners.

The defendant Carroll was arrested on September 28, 1951, and the indictment against petitioners and the other defendants was handed down on August 25, 1952 (R. 1078-1092, App. 1a, 6a-14a). It appears from the endorsements on the indictment, as well as from the docket entries appearing on pages 1a to 5a of the Appendix that between August 1952 and June, 1956, the Government did not take any steps whatsoever to bring this case to trial and the case was completely dormant for almost four years from the date of the filing of the indictment. As a matter of fact the Government did not proceed in the usual manner to adjourn the case from time to time but marked the case off the calendar and the case so remained for several years. This inaction on the part of the Government in failing to bring the case to trial minimized the chances of the defendants to have a fair and speedy trial within the meaning of the Sixth Amendment to the Constitution.

It is significant that only after having received the books and records from the agents of the Internal Revenue Service did the prosecution indicate a willingness to proceed to trial and, as a matter of fact, press for immediate trial at a time when petitioners were not represented by counsel. The docket entries also show that the notice of appearance by counsel was filed on June 14, 1956 (App. 3a). In view of the approaching summer vacation the trial was adjourned to September 11th, when the trial began before Judge Palmieri. Under the circumstances of the related facts petitioners had no opportunity to make the motion prior to the commencement of the trial. A finding that the motion was untimely, as a basis for a denial of the motion to suppress, under all of the circumstances of the case, is violative of the fundamental principles of justice and fairness.

Without the books and records obtained on May 31, 1956, from the Agents of the Internal Revenue Service the Government could not have produced the circumstantial evidence with respect to Frank Brooks required to submit the case to the jury.

As a matter of fact, the District Court had denied the motion to suppress upon the authority of *Zap* v. *United States*, 328 U. S. 624, and mentioned the untimeliness only incidentally in connection with the search of the premises in September of 1952, a matter with which this Court is not concerned. The District Court found it unnecessary to decide whether the transfer of the books and records from the Internal Revenue Service to the United States Attorney was illegal or not upon the theory that "the Government is proceeding by legislative authority, not express individual consent."

The District Court was of the opinion that by taking out the gold license petitioners had consented to said search by reason of the Gold Regulations. Although the Court of Appeals left this point undecided, the instant case can be distinguished from the *Zap* case upon various grounds, to wit:

In the *Zap* case an inspection was made during regular hours at the place of business whereas in the case at bar the United States Attorney obtained the books from the Agents of the Internal Revenue Service, without the knowledge or consent of the petitioners, almost four years after the indictment had been filed against the defendants.

In the *Zap* case there was a contract between the Government and the defendant in which the defendant had agreed to an inspection of all of the books and records of the defendant by the Government and its representatives. Congress had provided for the inspection and audit of books and records of contractors such as Zap. The inspection and audit were authorized to be made "by a governmental agency or officer designated by the President or the Chairman of the War Productions Board." Certain officials of the Government, including the Secretary of the Navy, were authorized to exercise the power and they were also

delegated the power to authorize such officer or civilian officials of their respective departments to make further delegation of such power. The Federal Bureau of Investigation conducted the audit under the auspices and authority of an accountant and Cost Inspector of the Navy Department, under whose jurisdiction Zap's books and records had been placed for purposes of audit and inspection. The Court therefore held that the inspection by the Federal Bureau of Investigation was in effect an inspection by the Navy, although its officials were aided by agents of another department. The Court, in upholding the validity of the inspection, also based the decision upon the ground that the right to inspect, granted by the contract, was not limited to inspection by the Navy, but extended to any authorized representatives of the Government among whom the agents of the Federal Bureau of Investigation are included. The fact is that the inspection made by the Federal Bureau of Investigation, at the direction of the Navy Department, was directly in connection with the contract and pursuant to the terms thereof.

In the case at bar the right to inspect was limited to representatives of the Treasury Department for a period of one year after the disposition of the gold and limited to the particular records of acquisition and delivery of the gold.

In the *Zap* case there was a voluntary surrender of the records to the Federal Bureau of Investigation for the purpose of auditing with respect to work done under the contract, whereas in the instant case the books and records were not voluntarily surrendered to the United States Attorney by the appellants but were given to the Internal Revenue Agents solely in connection with an income tax investigation entirely unrelated to an investigation under the Gold Regulations. The surrender of the books and records by the Internal Revenue Agent to the United States Attorney on the eve of trial, without consent of appellants and in violation of their agreement to return the books and records "borrowed" from the appellants, can under no circumstances be considered a voluntary surrender since

the records included all books of account and exceeded the limited records involved in the Gold Regulation, were not given to a Treasury Agent, were not received by the United States Attorney for the purpose of inspection within the meaning of the Gold Regulation but solely for the purpose of prosecution, and were surrendered five years after the gold was purchased.

In the *Zap* case, the Court held that the Federal Bureau of Investigation Agents did not obtain access by force, fraud or trickery. In the instant case the Internal Revenue Agents represented that they wanted the books in connection with a tax investigation.

Moreover, the Supreme Court expressly stated in the *Zap* case that the consent to the inspection did not include the consent to the taking of the records. In fact the Supreme Court reiterates the fundamental rule laid down in *Weeks* v. *United States*, 232 U. S. 383, 34 Sup. Ct. 341, that private property obtained as a result of an unlawful search and seizure cannot be used as evidence in a criminal prosection of the owner. The Supreme Court also reiterates the rule laid down in *Silverthorne Lumber Co.* v. *United States*, 40 Sup. Ct. 182, 251 U. S. 385, that evidence unlawfully obtained should be suppressed on the theory that the Government may not profit from its own wrongdoing. In other words, the Supreme Court, in the *Zap* case, permitted the use of evidence illegally obtained for the sole reason that the defendant, by an express agreement, had explicitly permitted the inspection of the records in question and that in that case the obtaining of a search warrant seemed to be a mere technicality. Three Justices of the Supreme Court strongly dissented and, under no circumstances, can the holding of the majority be extended to a case in which no blanket consent for the inspection of all books and records was given by the defendant and where the inspection of one particular book was only permitted by Federal Regulations.

It is respectfully submitted that the Supreme Court, in the *Zap* case, never intended to reverse its ruling in the *Weeks* case, *supra,* in the *Silverthorne* case, *supra,* and in all other similar rulings subsequent thereto.

It follows from the foregoing that the *Zap* case, the main authority on which the District Court based its denial, has no bearing on the instant case and that the Courts below should have granted said motion on the merits. This is so even if the transfer of the books and records was literally a search and seizure, in violation of the Fourth Amendment to the Constitution, under the authority of the following cases.

Gouled v. *United States,* 41 Sup. Ct. 261, 255 U. S. 298;
Johnson v. *United States,* 68 Sup. Ct. 367;
Fraternal Order of Eagles v. *United States,* 57 Fed. (2d) 93;
United States v. *Mitchneck,* 2 Fed. Supp. 225;
Federal Trade Commission v. *American Tobacco Co.,* 44 Sup. Ct. 336, 264 U. S. 298;
United States v. *Lagow,* 66 Fed. Supp. 738;
Weeks v. *United States,* 232 U. S. 383;
United States v. *Guerrina,* 112 Fed. Supp. 126, modified 126 Fed. Supp. 609.

As to Question 3:

The objection made by the petitioners, during the trial, to the introduction of said books and records in evidence was based on the theory that the Government illegally obtained the books and records from the Internal Revenue Service on May 31, 1956, and as a result of such illegal act obtained the name of Frank Brooks and the information relative to the transactions with said customer. In order to refute said argument the Government contended that it had obtained knowledge of Frank Brooks back in July, 1951, when the petitioners turned over the books to the Secret Service Agents for their examination. In that

connection Mr. Ruskin, during the trial, made the following statement:

> "Your Honor, I just want to be clear if I am making this representation. What I am saying to your Honor is that we got the names of Frank Brooks and the other customers of Sheba Bracelets prior to July 1950—prior to July, 1951, from the examination of the books which was made in July 1951, when Mr. Carroll voluntarily turned the books over to the Secret Service and the Audit Division for their examination." (R. 688, 689)

After counsel for the petitioners had objected to the statement of Mr. Ruskin, because he was not in charge of the case in 1951 and first appeared in May, 1956, the Trial Court made the following direction:

> "But I want to make the record as clear as possible so that if there are any mistakes you can have them corrected. I will ask Mr. Ruskin to make the subject matter of his representation, to submit it to me in the form of an affidavit, either your own affidavit or the affidavit of a person properly qualified to substantiate those facts, so that I will attach that to Court's Exhibit 8, I will make that Court's Exhibit 8A, and then Mr. Palmer will have a complete record." (R. 689, 690)

No affidavit was ever filed by Mr. Ruskin in connection with said direction and there is no Court's Exhibit 8A in existence as part of the instant record on appeal.

The conclusion is inevitable that the Government obtained the name of Frank Brooks as a result of the illegal transfer of the books and records by the Internal Revenue Service to the United States Attorney.

The Court of Appeals made no mention of the failure of the United States to file an affidavit upon this very material point, although petitioners urged the failure to file that affidavit as a ground for reversal. Such conduct on the part of the prosecution was extremely prejudicial

to petitioners and deprived them of a fair trial, requiring a reversal of the conviction.

In *Berger* v. *United States*, 295 U. S. 78, this Honorable Court, at page 88, laid down the standard of conduct of United States Attorneys as follows:

> "The United States Attorney is representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

A compliance with the Trial Court's direction in the instant case was of extreme importance since one of the main issues raised during the trial was whether Frank Brooks, who, according to the books of Sheba Bracelets, Inc., was a substantial customer of the petitioner corporation, was a real or fictitious person. The apparent purpose of the direction of the Trial Court was twofold—firstly, to place upon the record, under oath, the facts to support the representations made by Mr. Ruskin; and, secondly, to include that affidavit in the papers used in connection with the motion to suppress. This conclusion is supported by the fact that the Court stated that such affidavit would be marked Court's Exhibit 8A.

The Court below, in its opinion, states that full knowledge of Frank Brooks and of the entries in the books concerning him came to the United States Attorney in May, 1956, in a manner concerning which petitioners cannot "now" complain. Since it has been heretofore shown that

the objections to the introduction of said books and records and the motion to suppress said books and records, made during the trial, were timely, petitioners' complaint about the illegal manner in which the United States Attorney obtained said books and records was not belated and the failure of the United States Attorney to file an affidavit in connection with said issue constituted prejudicial error and prevented a fair trial.

As to Question 4:

The case of *Jencks v. United States*, 77 Sup. Ct. 1107, gives the right to an accused to inspect statements and reports of Government witnesses in possession of the prosecution touching the subject matter of their testimony at the trial and offer same in evidence because only counsel for the accused is adequately equipped to determine their effective use for the purpose of discrediting the Government's witness.

The Court of Appeals held that the *Jencks* case does not apply to the Secret Service reports with respect to Frank Brooks for the reason that they had nothing to do with the testimony of any witness at the trial, and were not sought by the petitioners for use in examining or cross-examining any witness, and the privilege of examining the reports was not requested by the petitioner at all. The fact is that the defense had requested that said Secret Service reports be marked in evidence and that the Trial Court had denied said request, as appears by the following in the record:

> "Mr. Palmer: All right. All I am asking you then, when you get through with them, because I want to mark them in evidence to * * *.
>
> The Court: No, they won't be marked in evidence." (R. 888)

Petitioners' trial counsel realized that the denial of the application to mark said reports in evidence precluded him from examining said reports and he therefore did not

press for an examination of the reports which the Trial Court refused to mark in evidence.

That the inspection of said reports and their admission in evidence are treated by the Supreme Court as one and the same thing appears from the following holding in the *Jencks* case:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, Roviaro v. United States, 353 U. S. 53, 60-61 * * *."

The Secret Service reports did relate to evidence introduced by the prosecution during the trial.

As heretofore stated, one of the salient issues in this case was the existence or nonexistence of Frank Brooks and the time when the Government had obtained knowledge of Frank Brooks through the examination of the books and records of the corporation.

The purpose of the request by petitioners' counsel to mark these reports in evidence was to discredit the statements made in the affidavit of John W. Braun submitted in opposition to the motion to suppress and to refute the representations of Mr. Ruskin to the effect that the Government had obtained knowledge of Frank Brooks in July, 1951.

The Court of Appeals, in its opinion, recognizes that the reports of Agent Newbrand, during his cross-examination, should have been turned over to the defense to be used in connection with the cross-examination of said witness, but holds that any error in refusing to hand them to defense counsel was a harmless one which did not affect the substantial rights of the petitioners for two reasons: (1) the use of the reports of Agent Newbrand on cross-examination would not have accomplished anything other than a demonstration that Newbrand had written, in his

reports, the same thing to which he testified at the trial; and (2) the guilt of the petitioners was overwhelming.

Under the holding in the *Jencks* case it is entirely immaterial whether the contents of said reports confirm or contradict the testimony of the witness at the trial since it is within the right of counsel for the defendants to determine the extent of the use that he may wish to make of the reports in connection with his cross-examination and the refusal to afford counsel that right constitutes reversible error even if the contents of the reports confirm the testimony of the witness at the trial.

The procedure adopted by the District Court was disapproved by this Court in the *Jencks* case in the following language:

> "Only after inspection of the reports by the accused, must the trial Judge determine admissibility."

The Government and the Court of Appeals endeavored to excuse the error committed by the Trial Court, in failing to turn over the reports of Agent Newbrand to petitioners, by applying the harmless error statute.

Moreover, the testimony of Secret Service Agent Newbrand was of the same crucial nature as the testimony of Ford and Matusow in the *Jencks* case and the impeachment of said testimony was singularly important to petitioners. In holding that the guilt of petitioners was overwhelming the Court below emphasized the testimony of Mr. Newbrand, to the effect that said agent had surveilled petitioner Carroll on seventeen days in September, 1951.

It appears clearly from the opinion of the Court of Appeals that without the testimony of Agent Newbrand there would not have been sufficient evidence to warrant the submission of the case to the jury.

That the majority of the Court in the *Jencks* case refused to apply the harmless error statute appears clearly from the opinion of Mr. Justice Burton, who concurred with the majority in the result but disagreed with the

Court's holding that the failure to produce the records to the defendant necessitated a new trial and stated that whether a new trial is required should depend on the contents of the requested reports, relying upon Rule 52(a) of the Federal Rules of Criminal Procedure.

To the extent that the decision in the case at bar is in conflict with the decision in the Jencks case, it is important that the Supreme Court review said decision and definitely create a guide for District Courts and parties with respect to whether the right of defendants to inspect records may be taken away by the Trial Court's finding that the testimony is consistent with the report, and whether an error in refusing to permit such inspection may be excused by application of the harmless error statute.

The guilt or innocence of petitioners should not have been determinative of the question as to whether a substantial right of the defendants was violated when the Trial Judge refused to turn over to defense counsel the reports of Agent Newbrand for the purpose of cross-examination. *Kotteakos et al.* v. *United States*, 328 U. S. 750, 763-764, 66 Sup. Ct. 1239, 1247; *United States* v. *Coplon*, 175 Fed. (2d) 629, 640.

Conclusion

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this Honorable Court. Accordingly petitioners ask that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioners.

PALMER, MASIA & PALMER,
of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—October Term, 1956.

(Argued May 14, 1957 Decided August 14, 1957.)

Docket No. 24419

UNITED STATES OF AMERICA,

Appellee,

v.

SHEBA BRACELETS, INC., and ROBERT J. CARROLL,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,*
SWAN and POPE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge.*

Sheba Bracelets, Inc. and Robert J. Carroll, appeal from the judgments of conviction for violations of § 1001, Title 18, U. S. C., upon four counts of an indictment. Affirmed.

PALMER, MASIA & PALMER, *Attorneys for Appellants;* Samuel Masia and Henry H. Zolki, of Counsel.

PAUL W. WILLIAMS, United States Attorney, *for Appellee;* Robert Kirtland and Robert K. Ruskin, Assistant United States Attorneys, of Counsel.

POPE, *Circuit Judge*:

The appellants, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, its treasurer, were convicted upon four counts of an indictment under Title 18, § 1001, U. S. C.[1] In these counts the two defendants were charged with knowingly and wilfully making false, fictitious and fraudulent statements and representations in an "End-Use Certificate for Semi-Processed Gold." The false statements were charged to have been made in two certificates of that character on the 14th and 28th of September, 1951. The statements charged to have been false were (a) that the defendant Sheba was regularly engaged in the industry of manufacturing jewelry which required the use of gold; and (b) that certain gold which was sold to Sheba would be used by it in the industry in which it was regularly engaged.[2]

Sheba held a license issued to it under an executive order made pursuant to Title 12 U. S. C. § 95(a) which authorized it to acquire gold for use in the jewelry manufacturing industry.[3] On the dates mentioned in the indict-

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[1] "§ 1001. Statements or entries generally—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] The case was tried upon these four counts, upon which the defendants were convicted, and also upon a count charging conspiracy to violate Title 12 § 95(a) U. S. C. providing for an embargo on bullion and gold and regulating transactions in gold or silver coin or bullion. The conspiracy count was dismissed at the conclusion of the Government's case.

[3] Executive Order No. 6260, which appears as a footnote to this section (at p. 451 of U. S. C. A.), provides that "No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order."

ment, Carroll, for the corporation, delivered to a firm of gold refiners these end use certificates for the purpose of procuring the quantities of gold which Sheba was permitted to purchase under its license. The Government's evidence was that contrary to the representations made in the certificates, Sheba was not engaged in the manufacture of jewelry and the gold purchased was not intended to be used for such purpose, and was in fact disposed of otherwise.

One group of errors assigned by appellants relate to the court's denial of motions to suppress evidence alleged to have been obtained by the Government by unlawful means. Most of the other claims of error arise out of the court's refusal to require the prosecution to furnish the defendants certain written reports made at the time by Government Secret Service agents concerning events and activities testified to by them at the trial.

Insofar as it has any substance, the argument relating to the motion to suppress grows out of the circumstance that the Government produced evidence tending to prove that one Frank Brooks, who, according to Sheba's books, purchased its entire output of gold bracelets from March, 1951, on, was non-existent,—that there was no such person. This was a substantial part of the evidence which the Government adduced to show that Sheba manufactured no jewelry and had no customers for bracelets. The argument is that if the evidence which appellants say was illegally secured had been suppressed by the court, the Government could not have relied upon this proof as to the non-existence of Frank Brooks. They say that only through illegally obtained evidence did the prosecution procure the investigative lead or clue as to Frank Brooks; that the knowledge that the sole customer was supposedly one Frank Brooks was "knowledge gained by the Government's own wrong,"[4] and hence this proof could not be used at all.

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[4] *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.

The manner in which the Government procured the evidence on which it relied for conviction was as follows: On July 25, 1951, Treasury agents went to the premises where Sheba purported to be manufacturing jewelry for the purpose of inspecting its books. Such inspection was authorized by the terms of the license.[5] Carroll was absent when the agents arrived. They waited for him and when he telephoned they talked to him explaining they were there to inspect the premises and examine the books. He stated he had no objection, but that his employees there present (employees of Carroll Instrument Co., a different concern of his), did not have sufficient knowledge of the books. He then made an appointment to meet the agents later in the day at the United States Assay office. At that time and place he was given a list of the books and records required, and two days later these were sent by Carroll to the agents by messenger. The agents kept them for a week returning them on August 3. Included was the Cash Receipts Book, the same book which was subsequently received in evidence at the trial as Exhibit 18. This was the book which recorded the sales of gold bracelets to Frank Brooks. It was while the agents were waiting for Carroll at the Sheba place of business that they noticed that although there was

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[5] In its original application for a gold license Sheba agreed that it "will keep exact records of all his acquisitions and deliveries of gold" and to "make such records available for examination by a representative of the Treasury Department at any time." Its license required it to "Keep all records prescribed under § 54.26 of the Gold Regulations." That section (Code of Federal Regulations, 1949 Ed. Title 31, Part 54, § 54.26) provided: "Records. Every person holding a license issued pursuant to § 54.23 shall keep exact records of all his acquisitions and deliveries of gold. His records shall contain the name, address, and license number of each person from whom he acquires, or to whom he delivers, gold (other than fabricated gold) and shall show the amount, date and description of each such acquisition and delivery, and such records shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold."

jewelry manufacturing machinery there it was not set up for use, apparently merely stored there, and covered with dust.

Between April 2 and September 13, 1951, Carroll for Sheba purchased from Kastenhuber & Lehrfeld, New York gold refiners, 15,000 ounces of gold, valued at $534,000. These were acquired in separate purchases of approximately 150 ounces each, and on each occasion an end use certificate executed on behalf of Sheba, was delivered to the refiners. Carroll's procedure, in making these purchases, followed a fixed pattern. He would meet a Louis Fisher at a bank, where Fisher would hand him a sum of cash. He would then get a certified check from the bank and with that pay for the gold. The 150 ounces, usually in three bars, would be wrapped in brown wrapping paper when delivered to Carroll.

In September, 1951, Treasury agent Newbrand began following Carroll after he made these purchases. On seventeen different days during that month Carroll would emerge from Kastenhuber & Lehrfeld carrying the package wrapped in brown paper and would go to a building at 10 West 47th Street in Manhattan in which was located the office of Mr. and Mrs. S. Diamant. (Mrs. Diamant was a cousin of Louis Fisher, who delivered the cash to Carroll.) On each occasion Carroll would emerge from the building five or ten minutes after he had entered, and without the package of gold. On September 28, the last of these seventeen days, Agent Newbrand followed him upstairs in the building and saw him enter the Diamant office. When he came out without the package, Carroll was placed under arrest by the agent. Within a half hour another agent arrived with a search warrant for the Diamant office, but upon search no gold was found there. There was then no warrant for Carroll's arrest, and as we shall hereafter note, defendants made much ado about this arrest without a warrant. A reading of the record gives the impression that the defense was contending that because the arrest was

an illegal one, the consequence was not merely that evidence taken as an incident to that arrest would be subject to a motion to suppress, but that its effect was to give the defendants an immunity from prosecution.

At the time of the arrest a felony had been committed and there was reasonable cause for believing that Carroll had committed it (Cf. *United States* v. *Perez*, 2 Cir., 242 F. 2d 867, 869). The officer had authority to make such arrest.[6] While the arrest would appear to have been a lawful one, yet nothing turns upon whether it was or not, for it does not appear what if anything was taken from Carroll at the time of his arrest, and nothing so taken was offered or received in evidence against the defendants. Hence the circumstances of the arrest could not be an occasion for an effort to suppress evidence.

In the afternoon of the day of Carroll's arrest, Newbrand with another Treasury agent went to Sheba's place of business in Brooklyn. They had no warrant to search those premises, which were in the main occupied by Carroll Instrument Co. The foreman of the latter company gave them permission to look around the premises. They made an inventory of the gold manufacturing machinery, which was stored in the rear of the place, and they took with them three sales invoice tablets, several Post Office Department return receipt cards, several cancelled checks, and a sheet listing names of Brazilian companies.

Appellants undertake to characterize this occurrence as an illegal search and seizure, and say that knowledge of Frank Brooks "came from the books and records illegally seized on September 28, 1951, the date of the arrest of the defendant Carroll." There is no proof to support that

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[6] Title 18 U. S. C. § 3056 authorizes Secret Service officers to "detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations and securities of the United States and of foreign governments." The falsified end-use certificates were a part of the Government's system of regulation of bullion and coin provided for in Title 12, § 95(a).

assertion, and the fair inferences from the record are all to the contrary. It nowhere appears that on that occasion either of the agents examined the books, or more particularly, the Cash Receipts Book, where the Frank Brooks name appeared.[7] So far as that book was concerned, there is no showing that there was any search of it on that occasion, nor of any other record referring to Frank Brooks, and definitely there was no seizure of it, for it remained in defendants' possession. As for the tablets, the return receipt cards, the checks and the list of Brazilian companies they did take, none of them were offered in evidence.

The Cash Receipts Book, with its entries re Frank Brooks remained in Sheba's possession until April, 1954. At that time a revenue agent of the International Revenue Service was making an income tax examination of Sheba for the years 1948 through 1951, and Carroll was requested to furnish Sheba's records for the agent's use in connection with that examination. Carroll complied, and delivered the books and records, including the Cash Receipts Book, to the office of the District Director at Brooklyn. Carroll's affidavit in support of his motion to suppress these books as evidence stated that the Internal Revenue agent had promised to return the books within a short time.

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[7] The court was warranted in inferring that counsel for defendants carefully avoided any inquiry as to whether the agents examined the books on that occasion. Counsel cross-examined agent Newbrand as follows: "Q. When you were in the place on September 28th, before you left, did you see any books and records there of the Sheba? A. Yes, I believe I did. Q. Afterwards did you see those books and records in 90 Church Street or anywheres else, or in the District Attorney's office? A. Yes, I saw them in the United States Attorney's office. Q. When? A. In June. Q. In June? A. 1956. Q. Did you see them before that time? A. No, I don't believe so." The trial court later remarked to defense counsel that this appeared to be "adroit" questioning: "Then you left it and dropped it very quickly at that point."

The books were not returned, and in May, 1956, the examining agents turned them over to the United States Attorney at his request. It was thus that the prosecution gained access to the books and had them available for introduction at the trial which opened on September 11, 1956, some four months later.

When the United States Attorney received those books, § 7213(a) of the 1954 Revenue Code made it unlawful for any officer or employee of the United States to permit any book containing particulars of income returned by a taxpayer to be seen or examined by any person except as provided by law. § 1905 of Title 18 U. S. C. prohibits any officer or employee of the United States to divulge, disclose or make known in any manner or to any extent not authorized by law any information coming to him by reason of any examination or investigation made by such officer or employee where that information concerns the amount or source of income of any corporation.[8] Appellant argues that it was unlawful for the revenue agents to furnish these books to the United States Attorney for use by him in a criminal prosecution, particularly for an offense having nothing to do with taxes.

Appellant contends that such an unauthorized delivery of these books to the prosecuting officers was tantamount

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[8] § 1905 Title 18 U. S. C.: "Disclosure of confidential information generally—Whoever, being an officer or employee of the United States * * * publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the * * * identity, confidential statistical data, amount or source of any income, * * * of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

to an unlawful and unreasonable search or seizure; that in law it amounted to the same thing, and that therefore appellants were entitled to have these books suppressed as evidence and returned to them; that they were improperly received in evidence, and the prosecution was improperly permitted to use the fruits of their unlawful acquisition in turning up the evidence with respect to Frank Brooks.[9]

Of course Sheba, though a corporation, was entitled to claim the protection of the Fourth Amendment. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. But we find it unnecessary to pass upon the validity of this contention of appellants. Even if it be assumed that the delivery of these books to the United States Attorney was contrary to law, and that his obtaining them was tantamount to an unlawful search and seizure,[10] appellants

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[9] Appellants' theory with respect to this is best stated in an affidavit filed by Carroll in support of the motion to suppress as follows: "Deponent is also informed by his attorney that under the authorities above cited the documents seized by the Government must be returned to deponent, or at least that those documents cannot be admitted in evidence. In this connection deponent is informed by his attorney that it is entirely immaterial whether the documents in question were taken by the Government by force or whether some of those documents were turned over by deponent to the Agent of the Internal Revenue Bureau after his arrest when they stated that they were making an investigation of deponent's books for tax purposes. Deponent is informed by his attorney that any such turning over of said books and records cannot be considered as voluntary since anything done by deponent after his arrest must be presumed to have been done under compulsion."

[10] We assume that the argument sought to be made with respect to the use by the prosecution of books which had been voluntarily delivered to the Revenue Agents solely for an income tax investigation is based upon the reasoning that if the Government can first require a person to produce his books for an income tax investigation pursuant to the requirements of the Internal Revenue Code (§ 3614 of the 1939 Code and § 7602 of the 1954 Code), and then search through them and ferret out evidence to be used in the prosecution of offenses not related to taxes, then there has been a substantial

waived any right they may have had to move for their return by their failure to make timely application to suppress them.

All of the facts relating to Carroll's arrest, to the Treasury agents' visit to Sheba's premises on September 28, 1951, and the fact that Sheba's books which had been delivered to the Director of Internal Revenue had come into the hands of the United States Attorney, were known to Sheba and Carroll long before the case came to trial. Yet it was not until after the Government's case in chief had been concluded and some evidence had been offered on behalf of defendants that defendants' motion to suppress was presented to the trial court.

The trial was begun on Tuesday, September 11. At the end of the day on Thursday, September 13, the court excused the jury until the following Monday to meet the convenience of persons in attendance at the trial who desired to commence the celebration of the Jewish holiday at the end of the following day. Counsel were required to attend the following morning, September 14, and it was at that time that defendants moved to dismiss sundry counts in the indictment and undertook to argue the question of

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denial of such persons' Fourth Amendment right "to be secure in their persons, houses, papers and effects." *United States* v. *Guerrina* (D. C. E. D. Pa.), 112 F. Supp. 126, appears to be the only case tending to support that contention. The order suppressing evidence in that case was subsequently withdrawn upon a reconsideration of the case. *United States* v. *Guerrina*, 126 F. Supp. 609. *United States* v. *Wolrich* (D. C. S. D. N. Y.), 129 F. Supp. 528, differs from this case in that the court there, upon hearing of a motion to suppress, agreed to hear evidence on the question whether the taxpayer's books and papers were obtained by the tax officials through fraudulent misrepresentations as to the purpose of the investigation. Some general references to the question have been made in *Scanlon* v. *United States*, 1 Cir., 223 F. 2d 382, 384, and in *Boren* v. *Tucker*, 9 Cir., 239 F. 2d 767. In both cases the proposed use of the evidence supplied to the Revenue Agents was in the prosecution of crimes defined by the Internal Revenue Code.

the legality of Carroll's arrest, of the alleged search and seizure of Sheba's premises on September 28, 1951, and of the process by which the United States Attorney procured Sheba's books from the revenue agents. The motion to suppress, supported by affidavits, was presented on the following Tuesday, September 18.

The court held that there had been a waiver of any constitutional right defendants may have had by their failure to move to suppress the evidence in advance of the trial; and found that not only defendants, but their counsel, also, knew about all these circumstances months prior to the trial. The court said: "Since I believe that it would not further substantial justice to allow a motion to suppress this evidence in the midst of the trial I deny this part of the motion."

The showing made on the motion to suppress was such as to compel the court's finding that defendants were aware of all the circumstances relating to the alleged improper procuring of evidence long before the case came to trial. Thus Carroll in his affidavit in support of the motion to suppress stated that about six months after his arrest an Internal Revenue agent asked to check the records of Sheba for tax purposes and examined the records on the premises; that the agent asked Carroll for other books and records, apparently missing, and Carroll informed him "that the Secret Service agents had searched the premises and were seen to have removed certain records." After reciting that he later allowed another Internal Revenue agent to have his books for a tax investigation said to have nothing to do with the indictment, Carroll continued that in spite of the agent's promise to return the books, deponent "never saw those books again until June of 1956, when he visited the office of the United States Attorney in charge of the case." It was then for the first time that deponent learned that the Internal Revenue Department had turned over the books which were given to them in connection with the alleged tax investigation to the United States Attorney's office for the purpose of the instant proceeding."

The court was satisfied that defendant's counsel also visited the United States Attorney's office about the same time, and saw the books there. Not only did that appear from the affidavit of the Assistant United States Attorney, but in his opening statement to the jury counsel for the defendants said that he had seen Sheba's books in the office of the Assistant United States Attorney "when they called us down to their office." Counsel had entered his appearance for the defendants on June 15, 1956, and at that time made a statement to the court complaining about Carroll having been arrested without a warrant and asking that there be returned various papers then taken from Carroll.[11] The court was also justified in disbelieving as wholly incredible he assertion of the defendants that it was not until during the trial that they learned for the first time that Carroll's arrest and the search were made by the Government without warrants. In any event, as stated by this court in *United States* v. *Chieppa*, 241 F. 2d 635, 638, "If they were unaware of the lack of a warrant, they could have easily acquired that information far in advance of the trial."

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[11] It is not difficult to understand why the court accepted the Governement's assertion that defendants were fully advised as to the circumstances relating to the Government's procuring of books long before the date of the trial. Thus the following colloquy occurred between the court and counsel for the defendants: "The Court: Just one last question. Do you admit having told Mr. Ruskin in substance, in June that you were concerned about the legality of the arrest and the seizure of papers from the person of Mr. Carroll and that you wanted an inventory of what they seized? Mr. Palmer: I have no recollection, honestly, of a conversation of that kind. I know we were in there kidding with each other, because I wanted my client to get hold of the records, which finally turned up in their office, but I have no recollection of any particular conversation along that line, because I never knew he wasn't arrested legally. The Court: I have a feeling that you may very well have waived whatever rights you have by not making a timely motion. Mr. Palmer: I am sorry, I wasn't in the case. The Court: But you don't deny making the statement; you don't recall it, but you don't deny it."

Actually what transpired when the agents went to Sheba's premises on September 28, 1951, is irrelevant here in view of the fact that the Cash Receipts Book with its entries relating to Frank Brooks came into the hands of the United States Attorney in May, 1956, and thus the information and knowledge as to Frank Brooks was available from a source wholly independent of anything that may have transpired on September 28, 1951. If we were to assume that the agents improperly obtained knowledge about Frank Brooks on September 28, 1951, that would not mean that the Government could not use information about Frank Brooks which it later obtained from another source. Facts improperly obtained do not become secret and unaccessible. If knowledge of them is gained from an independent source they may be proven like any others. Cf. *Nardone* v. *United States*, 308 U. S. 338, quoting from *Silverthorne Lumber Co.* v. *United States*, *supra*. The important single fact here is that knowledge of the purported dealings with Frank Brooks came into the hands of the United States Attorney when he received the books from the Revenue Service. This was known to the defendants in June, 1956, substantially three months prior to the date of the trial.

It has long been the rule, certainly ever since the decision in the *Weeks* case (*Weeks* v. *United States*, 232 U. S. 383), that a defendant desirous of taking advantage of his right to object to the use of evidence obtained illegally or in violation of his rights under the Fourth Amendment must move to suppress and have the books or evidence returned to him in advance of the trial unless the circumstances are such that he is without the necessary knowledge or opportunity to do so. This rule has now been incorporated in the last sentence of Criminal Rule 41(e),[12] but it is merely a re-

[12] "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion but the court in its discretion may entertain the motion at the trial or hearing."

statement of the law as it was previously. *United States* v. *Di Re*, 2 Cir., 159 F. 2d 818, 820.

The manner in which the United States Attorney obtained the books from the Income Tax Bureau did not literally constitute a "search and seizure" of the sort described in Rule 41. But the same reasons which gave rise to the original rule that a motion to suppress evidence must ordinarily be made before trial, would clearly operate here to require us to sustain the trial court in exercising its discretion to refuse to suppress the books obtained from the Internal Revenue Service on the ground that motion was not timely made. Those reasons were stated in *Segurola* v. *United States*, 275 U. S. 106, 111, as follows: "This principle is that, except where there has been no opportunity to present the matter in advance of trial, * * * a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal case permit a collateral issue to be raised as to the source of compe[illegible] evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it." In *Nardone* v. *United States*, *supra*, dealing wtih evidence claimed to have ben obtained as a result of unlawful wire tapping, the court said (p. 341: "Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention * * * And if such a claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim."

In *United States* v. *Salli*, 115 F. 2d 292, 293, this court, citing both the *Segurola* and the *Nardone* cases, in upholding the trial court's refusal to entertain motions to suppress evidence alleged to have been obtained through unlawful search and seizure, said: "But the defendants may not raise the question here because they waited until the trial came on—four months after the indictment was found—before they raised it * * * There is every reason why [the Supreme Court should express the views as in the *Nardone* case] when the facts are all available in season; nothing is more unfair than to leave open a preliminary inquiry which will make the whole prosecution abortive, and thus put the authorities and their witnesses to the trouble and expense of useless preparation." Similar views have been expressed by this court in *United States* v. *Sansone*, 231 F. 2d 887; *United States* v. *Chieppa*, *supra*; and *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925.

We hold that the trial judge had a similar discretion to refuse to suppress the books of Sheba received from the Internal Revenue Service and the evidence resulting therefrom because whatever right Sheba might otherwise have had to object to the manner in which the books were obtained, was waived through its failure to move to suppress until midway in the trial of the case.

The Government has argued that since Sheba had applied for a license, and thus agreed to regulations which required it to keep records which are to be "available for examination by a representative of the Treasury Department," it must be deemed to have consented to the use that the Government officials made of its books, and to have waived its claim to privacy under the rule of *Zap* v. *United States*, 328 U. S. 624, 628. Whether the waiver was found in the *Zap* case only because the inspection "was made during regular hours at the place of business," and whether the facts of this case would require a different conclusion

need not be considered by us, for, as we have seen, failure to move to suppress the evidence before the trial is fatal to appellants' position in any event.

This brings us to the second group of contentions made by the appellants—those relating to the refusal of the court to require the prosecution to furnish certain written reports of the Secret Service agents to the defendants.[13] The first set of Secret Service reports requested had nothing to do with the testimony of any witness at the trial, nor were they sought by defendants for use in examining or cross-examining any witness. In fact, the privilege of examining them was not requested by the defendants at all. What happened was that during the trial when counsel for the defendants were asserting that the Government had learned about Frank Brooks by a search of Sheba's premises on September 28, 1951, the prosecutor made the statement that the Government had obtained knowledge of Frank Brooks and was actually making investigations concerning him prior to that date and in consequence of information obtained through the inspection of Sheba's books in July, 1951, when Carroll sent them by messenger to the Assay Office.

After this statement had been made by the United States Attorney, defendants' counsel asked the court to examine those reports for itself for the purpose of checking the accuracy of this assertion. The court agreed to do so and the reports were handed to the court by the Government. Thereupon the following colloquy occurred between defendants' counsel and the court: "Mr. Palmer: Will they be marked as a Court Exhibit? The Court: I will put them in a sealed envelope and they will be marked as a Court exhibit in a sealed envelope. Mr. Palmer: Very good.

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[13] The complaint respecting the refusal to furnish defendants these reports was not made until after the case had been argued and submitted. After the decision in *Jencks* v. *United States*, — U. S. — (June 3, 1957), appellants applied for and were granted leave to file a supplemental brief for the purpose of urging that the rule of the *Jencks* case required a reversal here.

The Court: And will not be subject to your scrutiny, but they will be available for the scrutiny of the appellate court, if the appellate court is so advised. Mr. Palmer: All right." No further request was made in respect to those reports. It is plain that their examination by the court *in camera* and without showing them to counsel for the defendants could under no circumstances constitute prejudicial error since, for the reasons here previously indicated, it was of no consequence whether the Government did or did not know about Frank Brooks through the July examination. It is plain that full knowledge of him and of the entries in the books concerning him came to the United States Attorney in May, 1956, in a manner concerning which the appellants cannot now complain. Nothing in the *Jencks* case supports any claim of error in respect to these reports.

The next ruling concerning Secret Service reports of which appellants complain had to do with the refusal of the court to call for and examine the report of Secret Service Agent Sweeney. Agent Sweeney was called as a witness by the defense which procured from him the testimony that when Carroll was arrested on September 28, 1951, the agents did not have a warrant for his arrest. On cross-examination Government counsel elicited from the witness testimony that he also had observed Carroll going into the Diamant building on September 17 or 18, 1951, carrying a package which he had left behind him when he came out a few minutes later. There was no further examination of Sweeney by the defendants and the witness was excused. The defense proceeded to call other witnesses. Both sides rested and the testimony was closed. This was on Friday afternoon, September 21, 1956, and the court adjourned until the following Monday morning, at which time arguments to the jury were to begin. On Monday morning, as the jury were waiting to hear summations, counsel for the defendants made the following request: "Another thing, if your Honor please. Will you be good enough to scrutinize the report by Mr. Sweeney, as to whether or not on the 17th or 18th of September he actually went into the premises of 47th Street and saw Mr. Carroll

go inside with the package and come out without the package?'' This the court declined.

It is plain that there was no error here. Not only had witness Sweeney been excused and the taking of testimony closed, but there was no suggestion on the part of the defendants that Sweeney's reports were sought for the purpose of aiding in any examination of Sweeney. Presumably Sweeney had left the courthouse, and there was no showing that he would have been available even if the court had been willing to reopen the case and order him recalled. "Whether a case may be reopened for further evidence rests in the sound discretion of the trial court and it will not be interfered with unless clearly abused." *People* v. *Siciliano,* 4 Ill. 2d 581, 123 N. E. 2d 725, 731. See, in accord, *State* v. *Shea,* —— R. I. ——, 75 Atl. 2d 294, 296; *State* v. *Massey,* —— Mo. ——, 219 S. W. 2d 326, 332. *United States* v. *Bayer,* 331 U. S. 532, 537-539, is, we think, an application of the same rule. Under the circumstances here there was no showing of an abuse of the court's discretion in rejecting the demand for the Sweeney reports. Nothing in the *Jencks* decision, *supra*, lends any support to the appellants' position on this.

During the cross-examination of agent Newbrand, counsel for defendants inquired whether he found a foot press at Sheba's premises. When the witness stated he did not recall, he was asked whether his notes would show; he replied that they would, and he was asked to look at them. He said he did not have the notes. He was requested to produce them and was so directed by the court. He produced his handwritten notes of what he did on September 28, 1951, the day on which he made the list of machines inquired about. The notes were marked as an exhibit and turned over to defendants' counsel. Counsel then inquired about reports of Newbrand's surveillance of Carroll on days prior to September 28, and was informed by the witness that these were all typewritten formal reports. He asked that they be produced: they were produced and scrutinized by the court, which marked them as court's exhibits.

Among the formal reports thus produced was one of September 28, 1951, verbatim the same as the handwritten notes for that date which had been furnished to the defendants' counsel. From this formal report of this date the court furnished defendants' counsel the page listing the equipment found at Sheba's premises on that date, but the remainder of the formal reports which referred to the surveillance of Carroll on September 5, 6, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 25, 26 and 27, although examined by the court, were not handed to counsel for the defense as he requested.

The Government concedes that under the decision in the *Jencks case, supra,* these reports should have been turned over to the defense, but asserts that the failure of the court to do so was not prejudicial and should be considered harmless error within the meaning of Rule 52(a) of the Rules of Criminal Procedure.[14]

True enough if these reports of Agent Newbrand had been furnished to defense counsel he might have used them in connection with his cross-examination of this witness. These particular typewritten reports were marked as "Court's Exhibit 6 for Identification" and are part of the record before this court. The description in them of Newbrand's surveillance of Carroll on his trips with the gold from the refiners to the premises occupied by the Diamants is in every particular the same as set forth in the handwritten notes of the September 28 surveillance. It will be recalled that the testimony was that on each of those seventeen days Carroll went through precisely the same movements in the delivery of the gold. It is difficult to see that the use of these reports on cross-examination would have accomplished anything other than a demonstration that Newbrand had written in his reports the same thing to which he testified at the trial.

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[14] "Rule 52(a): Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights should be disregarded."

But it is abundantly clear that any error in refusing to hand them to defense counsel was a harmless one which cannot, under any circumstances have affected the substantial rights of the defendants. This is so because the evidence of the guilt of the defendants was simply overwhelming. In the six months period April through September, 1951, Carroll on 94 different days purchased approximately 150 ounces of fine gold from the refiners. This was established by the production of 94 end-use certificates, including the two described in the indictment, from the records in the office of Kastenhuber & Lehrfeld. The certified checks which paid for the gold were produced and the gold that Carroll and Sheba acquired during that period amounted to approximately 15,000 ounces at a total cost of $534,000. As before indicated, on the 17 days in September on which Carroll was followed, the gold was left in the building occupied by the Diamants, and on the final day, Septemer 28, it was observed to have been left in Diamant's office. That on search, 30 minutes later, no gold was found does not disprove that it was left there, as it was shown there was opportunity to dispose of it, and the arrest of Carroll had taken place under Diamant's window and in plain sight.

There is no proof as to just what became of this 15,000 ounces of gold, but there was abundant and overwhelming evidence that none of it was used in the manufacture of jewelry. According to the Cash Receipts Book, Sheba sold the whole of an entire output for that period of approximately 10,000 bracelets to Frank Brooks of 712 Poplar Street, Philadelphia, at a total price of approximately $600,000. An employee of the Carroll Instrument Co., who worked on the same premises, and who was in the same room where Sheba's machinery was located every working day from July 2, 1951 until March, 1952, testified that he had never seen that machinery being operated, or any jewelry made, or any gold; that the machines were dusty and dirty and covered with cobwebs; and that although he

left the premises about 5:30 in the afternoon each day, Carroll, who came to the place for approximately one-half hour each afternoon, always left the premises before he did.

When the Treasury agents inspected the place in July, 1951, with Carroll's consent, they also noticed the dusty and unused condition and position of the machinery. They asked Carroll about this and he explained that the machines were in that shape because a Mr. and Mrs. Popper who operated the machines had been on vacation ten days. This explanation was demonstrated to be false. The entry in the Cash Receipts Book showing the sales of the entire output to Frank Brooks was also false, for the owner of the whole of the premises at 712 Poplar Street, Philadelphia, testified that he had lived there for 26 years, had never heard of Frank Brooks, that no person by the name of Frank Brooks had ever lived at that address, and that he knew of no such person. No witness was produced to show what became of this 15,000 ounces of gold; no person was produced to show that he had been employed to manufacture bracelets or anything else from this gold. If bracelets were sold to some person other than Frank Brooks, there was no apparent effort made to produce such person.[15]

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[15] A feeble effort to produce evidence that there had been a Frank Brooks of 712 Poplar Street, Philadelphia, was made when the defense issued a subpoena under which an officer of a Philadelphia bank appeared and testified that an account had been opened in that bank in the name of Frank Brooks of 712 Poplar Street, Philadelphia, on September 22, 1949. The account was closed on June 29, 1950. The witness had never seen the person who had opened the account, but testified that the records which he produced showed that it was "a very peculiar account" in that it indicated that the intention of the depositor who had opened the account with $200 was merely to keep the account at that amount, and that when deposits were made, checks for substantially the same amounts would be presented on the same day so that the account ran along for the two months in which it was actually active with a running balance of only about $200. This evidence would be as likely to indicate that the account was fictitious or simulated as that there was a person by the name of Frank Brooks of 712 Poplar Street.

The error in denying the Newbrand reports to the defendants was harmless "because the Government's case was overwhelming." *United States* v. *Chieppa, supra*, p. 640. It is plain that here, as in *United States* v. *Raspovich*, 2 Cir., 241 F. 2d 779, 781: "What must have convinced the jury beyond a reasonable doubt that appellants were guilty as charged, and what has produced in our minds a settled impression that the error lacks substance, is the overwhelming evidence of the various witnesses, which tallies perfectly with the exhibits and the attendant circumstances." As in *Lutwak* v. *United States*, 344 U. S. 604, 619, "This record fairly shrieks the guilt of the parties."

Appellants list as a further point involved in their appeal the denial of a speedy trial. The record shows that during the pendency of the cases against them the defendants themselves repeatedly and successfully sought delay and further time in which to prepare for their defense. Their complaint upon this point is a frivolous one.

Finally the appellants make the following purported assignment of error: "8. That the Court below erred in various respects in refusing to admit certain evidence on behalf of the defendants and with respect to the adequacy of the charge to the jury." That is not the succinct statement of a question involved contemplated by our Rule 17.[16] Nevertheless we have examined the evidence and the instructions sought to be referred to here by the appellants. We find no error in respect to any of these matters. Furthermore, after the charge was given, none of the defects now claimed by appellants were stated as ground of objection as required by Rule 30, Rules of Criminal Procedure. The evidence rejected related to periods long prior to the dates material here, and was wholly irrelevant.

The judgments are affirmed.

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[16] Rule 17 reads in part as follows: "Briefs. (a) Contents of appellant's brief. The brief for appellant or petitioner shall contain in the order here stated—(1) a concise abstract or statement of the case, presenting succinctly the questions involved, the manner in which they are raised and the errors claimed; * * *."

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No. 556

In the Supreme Court of the United States

October Term, 1957

SHEBA BRACELETS, INC., AND
ROBERT J. CARROLL, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. 190-202)[1] is reported at 144 F. Supp. 939. The opinion of the Court of Appeals (G. 33-55; Pet. App. 29-50) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1957 (G. 56). A petition for rehear-

[1] "App." refers to the blue printed appellants' appendix; "G." to the gray printed appellee's (government's) appendix and the papers immediately following it; and "R." to the typewritten transcript of testimony at the trial.

ing (G. 58-68) was denied on September 18, 1957 (G. 70). The petition for a writ of certiorari was filed on October 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied a motion by petitioner corporation to suppress certain records as to acquisition and delivery of gold, which records petitioner was required to keep in accordance with applicable Treasury Department regulations.

2. Whether the trial court's refusal to require the prosecution to furnish petitioners with certain written Secret Service reports was, in the circumstances of this case, reversible error.

STATUTES, REGULATIONS AND RULES INVOLVED

These are set forth in the Appendix, *infra*, pp. 16-21.

STATEMENT

Petitioners Sheba Bracelets, Inc. ("Sheba") and Robert J. Carroll, Sheba's treasurer, were charged in count 2 of an indictment returned on August 25, 1952, in the United States District Court for the Southern District of New York, with making a wilful false statement in violation of 18 U.S.C. 1001 (*infra*, p. 16) in an "End-Use Certificate for Semi-processed Gold" on September 14, 1951, to the effect that Sheba was regularly engaged in the manufacture of jewelry (App. 8). A similar offense on September 28, 1951, was charged in count 10 (App.

13-14). Count 3 charged a wilful false statement in violation of 18 U.S.C. 1001 on September 14, 1951, to the effect that the gold specified in the End-Use Certificate would be used by Sheba in the manufacture of jewelry (App. 9), and count 11 charged a similar offense on September 28, 1951 (App. 14).[2] The jury found both petitioners guilty on these four counts. Sheba was fined $5,000 on the four counts. Carroll was sentenced to 18 months' concurrent confinement on each count, and fined $5,000 (App. 4). On appeal (App. 4), the judgment was unanimously affirmed (G. 56).

The pertinent evidence adduced at the trial may be summarized as follows:

On March 18, 1949, Sheba was issued a gold license (Gov. Ex. 2) from the Treasury Department for the manufacture of jewelry (R. 64). Thereafter, temporary licenses (Gov. Ex. 3-8) were issued from month to month during the period from April through September 1951 (R. 66-67). During this time, Sheba made regular purchases of fine gold from licensed refiners, Kastenhuber and Lehrfeld (R. 150), and for each purchase submitted an "End-Use Certificate" representing that the gold was required for use in the manufacture of jewelry (G. 14; Gov. Ex. 14, 15, 16). The total purchases were for 15,000 ounces of gold, valued at $534,000 (Gov. Ex. 13).

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[2] Count 1 (App. 6-8), charging petitioners and others with conspiracy to violate 12 U.S.C. 95a (*infra*, pp. 16-17), was dismissed at the conclusion of the government's case (App. 3).

In purchasing the gold, Carroll (Sheba's officer) would meet one Louis Fisher at a bank, obtain cash from him, and then get a certified check from the bank (G. 3-4). Carroll would then purchase from Kastenhuber and Lehrfeld about 150 ounces of gold, paying for it by certified check. The gold bars were wrapped in brown paper and turned over to Carroll (G. 8-11, 12, 13).

On July 25, 1951, Secret Service agent Newbrand went to inspect Sheba's plant at 2747 Coney Island Avenue in Brooklyn, and discovered that the jewelry equipment was "not set up for use" and was covered with a "great deal of dust" (G. 22-25). Carroll explained this by stating that a Mr. Popper and his wife did all the jewelry casting, but were away on vacation (G. 26).[3] At this time, Treasury agents requested and received from Carroll certain of Sheba's books and records which were returned to Carroll on August 3, 1951 (App. 174-175). Included among these was the cash receipts book (Gov. Ex. 18; R. 336) (App. 177).

On September 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 25, 26, 27, and 28, agent Newbrand followed Carroll in New York. On each occasion, in leaving Kastenhuber and Lehrfeld's office, Carroll would carry a package wrapped in brown paper and

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[3] John Sciabica, employed by the Carroll Instrument Company at Sheba's address, stated that he never did meet a Mr. Popper there, and that Mrs. Popper worked there only a few weeks and did not engage in manufacturing jewelry (G. 19-20).

go to the office of Mr. and Mrs. S. Diamant.[4] Carroll would remain about five or ten minutes, and then come out without the package (G. 26-28).

On the last of these occasions, September 28, 1951, agent Newbrand arrested Carroll without a warrant as he left Diamant's office. When asked what he had done with the gold, Carroll replied, "I can't tell you. It involves too many people" (G. 28-29). Some personal business cards were taken from Carroll at the time of his arrest (App. 170; R. 660). About 25 minutes after Carroll's arrest, the agents, with a search warrant, searched Diamant's office, but did not find any gold (G. 29-30). On the same day, agents Newbrand and Braun went to Sheba's premises without a search warrant and obtained permission of an employee (Adler) to look around. The agents took 3 sales invoice tablets, several Post Office Department return receipt cards, several cancelled checks, and a list of Brazilian companies (App. 172, 175). None of these documents was used at the trial or in preparation for trial (App. 167).

John Sciabica was employed by Carroll for the Carroll Instrument Company which occupied the same premises as Sheba (G. 17, 21). His working hours were from 9:00 a.m. to 5:30 p.m., and he was employed there from July 2, 1951, to March 1952 (G. 17, 19). He testified that Carroll spent only a short time in the office each day (G. 19). He further testified that, during all the time he worked there,

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[4] Louis Fisher, from whom Carroll got the cash at the bank before gold purchases, is Mrs. Diamant's cousin (App. 94).

he never did see Carroll or anyone else manufacturing jewelry, and that the jewelry equipment was "dirty, just hanging around, just knocking around, as though it hadn't been in use" (G. 19, 20-21).

Sheba's records purported to show that it manufactured and sold gold bracelets in wholesale quantities. Sheba's invoices and cash receipts book for the period from March 1951 to September 27, 1951, indicated that it produced 9,400 bracelets all of which were sold to "Frank Brooks, 712 Poplar Street, Philadelphia" for $635,725 (Gov. Ex. 17, 18; G. 30).

Government witness Magarill testified that he had lived at 712 Poplar Street, Philadelphia, for 26 years and conducted a roofing and sheet metal business there. He had never known a Frank Brooks nor heard of anyone by that name in his neighborhood (G. 31-32). For the defense, an officer of a Philadelphia bank testified that a Frank Brooks at 712 Poplar Street had "a very peculiar account" there from September 22, 1949, until June 29, 1950 (App. 100-104).[5]

While the government was conducting an income tax investigation of Sheba, Carroll voluntarily gave some of Sheba's books and records to the Internal Revenue agents on April 27, 1954 (App. 178). On May 12, 1955, and June 27, 1955, Carroll voluntarily submitted certain bank statements and check stubs of Sheba (App. 179, 185). On May 31, 1956, in compliance with a request of the United States At-

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[5] The bank officer's testimony is summarized in footnote 15 of the opinion below (Pet. 19).

torney, Sheba's corporate records were turned over to him by the Treasury agents (App. 167). Included among these was the cash receipt book (Gov. Ex. 18; R. 336) which disclosed the jewelry sales to Frank Brooks.

The trial started on September 11, 1956 (R. 1). Petitioners filed a motion to suppress evidence after the government's case in chief had been concluded, and some defense evidence had been introduced (R. 661, 665-667). As to papers taken from Carroll at the time of his arrest, the court found that they formed no part of the prosecution's case (App. 196). As to the items taken from Sheba's premises on September 28, 1951 (*supra*, p. 5), the court denied this part of the motion as untimely (App. 200). As to the corporate books and records which Carroll had voluntarily turned over to the Internal Revenue agents in 1954 and 1955 (*supra*, pp. 6-7), the court apparently denied this part of the motion on its merits, being of the opinion that the jurisdiction of the Treasury agents was clear and that the government was proceeding by "legislative authority, not individual consent" (App. 199, 200).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 12-14) that the District Court erred in refusing to suppress Sheba's corporate records which the United States Attorney received on May 31, 1956, from the Internal Revenue agents, to whom Carroll had voluntarily delivered them for an income tax investigation in 1954 and 1955.

The opinion of the Court of Appeals rests on the ground that the District Court properly exercised its discretion in denying the part of the motion to suppress records received from the Internal Revenue agents, since the motion was untimely and the court was not required to consider it in the middle of the trial (Pet. App. 43). This may well be so, but it is not clear that the District Court's decision as to untimeliness related to more than that aspect of the suppression motion which related to the September 28, 1951, seizure of Sheba documents (App. 200), none of which was used at the trial or in preparation of the government's case (App. 167). The District Court did discuss the merits of the government's use of the corporate records (App. 197-200), and the holding that Sheba's records obtained from the Internal Revenue agents should not be suppressed can be independently sustained on those merits.[6]

As a holder of a license to manufacture gold jewelry, Sheba's business was the subject of public concern, and inspection of its records by the Treasury Department was a legitimate exercise of regulatory power. Cf. *Shapiro* v. *United States*, 335 U.S. 1, 32-35; *Davis* v. *United States*, 328 U.S. 582, 589-590. Under 31 C.F.R. (1949 Ed.) 54.26 (*infra*, pp. 18-19), by taking out a gold license Sheba consented that its records

[6] On this view, it is unnecessary to consider petitioners' arguments that Rule 41(e), F.R. CRIM. P. (*infra*, p. 21), did not apply since the books were not obtained by search and seizure, and that in any event the reason for Rule 41(e) had been removed by the court's one week adjournment of the trial (Pet. 12-18).

should be available for examination by representatives of the Treasury Department. When Sheba agreed to permit such inspection, it voluntarily waived such claim to privacy as it otherwise might have had regarding its gold acquisitions and deliveries. Cf. *Zap* v. *United States*, 328 U.S. 624, 628. Inspection of Sheba's records was permissible since the government was proceeding by legislative authority; and this was true regardless of any individual consent by petitioner Carroll. Accordingly, as the District Court ruled, the government clearly had the right to inspect the books and to use the information obtained as the result of inspection, irrespective of the tax investigation.

Since the records were corporate records not subject to the privilege against self incrimination, they could have been subpoenaed by the United States Attorney from petitioner corporation for use at the trial. Cf. *Zap* v. *United States*, 328 U.S. 624, 629. Had they been in the hands of some third party other than the government to whom the corporation had turned them over, they could similarly have been subpoenaed. Hence, the United States Attorney was clearly entitled to obtain these records in the hands of the Internal Revenue Service.[7] The government was thus using records and information which it

[7] 26 U.S.C. 7213 and 18 U.S.C. 1905 (*infra*, pp. 17-18), upon which petitioners rely (Pet. 13-14), apply criminal sanctions to government employees making unauthorized disclosure of income tax information, but do not by their terms render Sheba's books inadmissible. Here, as we point out in the text, there was no disclosure of information not authorized by law.

could have obtained, regardless of the tax investigation.

At most, petitioners' argument as to these records amounts to the contention that they should have been returned to the corporation and then subpoenaed, rather than passed directly from one branch of the government to another. But the procedure actually followed involved no invasion of petitioners' rights. If it is contended that a subpoena would have given petitioners notice and an opportunity to object, the fact is that petitioners had that opportunity. Although Carroll and his attorney, on two or three occasions before trial, were given the opportunity to inspect Sheba's records in the government's possession (App. 167; R. 656), they did not move to suppress the records until the trial was almost completed.[8]

Moreover, the inspection of, and use in evidence, of Sheba's books was significant only in the respect that it disclosed sales to Frank Brooks, a fictitious person. The government had this information in 1951 long before the return of the indictment and the delivery of Sheba's books to the United States Attorney in 1956 (see *infra*, pp. 11-12).

2. Petitioners also contend that they were denied the right to inspect and use certain Secret Service reports at the trial, contrary, they assert, to the holding in *Jencks* v. *United States*, 353 U.S. 657 (Pet. 26-28).

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[8] Carroll told the court at his sentencing that it was unfair of the government to say that he had been uncooperative, since he had tried to make his records available and cooperate in every way (R. 1060).

(a). Petitioners took the position that the government had obtained a lead as to bracelet sales to Frank Brooks (who, the prosecution discovered and argued, was fictitious) as a result of the allegedly illegal delivery of Sheba's books by the Internal Revenue Service to the United States Attorney in 1956. But in a colloquy with the court, government attorney Ruskin stated "* * * we got the names of Frank Brooks and the other customers of Sheba Bracelets prior to July, 1950—prior to July, 1951, from the examination of the books which was made in July, 1951, when Mr. Carroll turned the books over to the Secret Service and the Audit Division for their examination" (R. 688-689). The judge asked Mr. Ruskin to submit his own or another qualified person's affidavit as to this, and stated that he would mark such affidavit Court's Exhibit 8A. Mr. Ruskin stated that he would do as the judge requested (R. 689-690).

Although Mr. Ruskin apparently did not file an affidavit to be marked Court's Exhibit 8A, he did leave with the court copies of the Secret Service reports regarding the investigation of Frank Brooks as far back as July and August 1951 (R. 880-883). This colloquy occurred, regarding these reports, between the court and the defense counsel (R. 888-889):

> Mr. Palmer: Will they be marked as a Court exhibit?
>
> The Court: I will put them in a sealed envelope and they will be marked as a Court exhibit in a sealed envelope.

Mr. Palmer: Very good.

The Court: And will not be subject to your scrutiny, but they will be available for the scrutiny of the appellate court, if the appellate court is so advised.

Mr. Palmer: All right.

When the reports were so filed as a court exhibit, the court stated (R. 902-903):

> I wish to state that my examination of the Secret Service reports indicates that Frank Brooks was the subject of investigation by the Secret Service before the indictment in the present case was returned, and that the Secret Service had good cause to believe him to be a fictitious person; that many of the activities of the defendant in this case were of such a nature as to warrant the belief that the defendant was violating the very laws with which he is charged * * * by the device of using Brooks as an alleged customer.[9]

This is not a type of situation covered by the *Jencks* case. The reports were not sought for the purpose of assistance in cross-examination of a government witness for impeachment purposes. And, in the colloquy just quoted, defense counsel did not de-

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[9] From this, it appears that Mr. Ruskin was not guilty of bad faith (as petitioners contend, Pet. 22-25) in failing to produce information requested as to when the government first learned that Frank Brooks was a Sheba customer. Even though a particular affidavit marked Court's Exhibit 8A was not forthcoming, Mr. Ruskin did prove to the court's satisfaction, by means of the Secret Service reports, that the government knew of Brooks several years before Sheba's books were turned over by the Treasury agents to Mr. Ruskin.

mand inspection of the reports but expressed complete satisfaction with the *in camera* judicial inspection announced by the court as its contemplated procedure.

(b). During cross-examination of agent Newbrand, he stated that his notes would probably disclose whether there was a foot press in Sheba's premises on September 28, 1951, and the court, at defense counsel's request, directed that these notes be produced (R. 326-328). These handwritten notes were marked Court's Exhibit 4, turned over to the defense attorney (R. 372, 380-381), and later introduced in evidence (R. 388). Defense counsel also asked for production of all the typewritten formal reports of Newbrand's surveillance of Carroll on the days prior to September 28, 1951 (R. 383-386). These formal reports were marked Court's Exhibit 6 for identification. Among them was one of September 28, 1951, verbatim the same as the handwritten notes for that date which had been furnished to defense counsel. From this September 28 report, the court gave to defense counsel page 2, listing equipment found at Sheba's premises on that date, but refused to furnish counsel with the other reports as to surveillance of Carroll. In its ruling, the court expressly adhered to the government argument that "examination [of these reports] by defense counsel cannot assist them in their cross-examination of Agent Newbrand" (R. 469-470, 474).

The court below, noting that the government conceded that under *Jencks* these reports should have been turned over to the defense, held that the failure

of the trial court to do so was, under the particular circumstances, harmless error (Pet. App. 48-50). In view of the convincing evidence of guilt—the non-use of Sheba's jewelry machinery, Carroll's regularly repeated illegal purchases and disposition of gold, and the false entries in Sheba's books showing large-scale sales of bracelets to the fictitious Frank Brooks—it is submitted that this holding was correct. Cf. *Lutwak* v. *United States*, 344 U.S. 604, 619.

Jencks does not hold that the harmless error rule can never apply to a situation where government reports are not made available to the defense despite proper request for their use. Non-production of the F.B.I. reports in *Jencks* was found to be error since it resulted in unduly circumscribing the effectiveness and extent of the cross-examination of key government witnesses. Here, unlike *Jencks*, the trial judge who denied the motion did examine the reports. His considered opinion that they could not assist in the cross-examination of Newbrand is entitled to great weight on the issue of harmless error. The judge was careful to preserve the interest of the petitioners under the law as he then understood it to be, requiring the production of the reports when their existence was disclosed, turning over those that had any possible bearing on the testimony, and examining the others. The Court of Appeals, which had the reports before it, was of the opinion that use of the suppressed reports would have accomplished nothing "other than a demonstration that Newbrand had written in his reports the same thing to which he testified at the trial" (Pet. App. 47). In these cir-

cumstances, application of the harmless error doctrine by the court below was a proper disposition of the problem.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1957.

APPENDIX

18 U.S.C. (1952 Ed.) 1001 provides:

Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

12 U.S.C. (1952 Ed.) 95a provides:

Embargo on bullion or coin; hoarding; requirement of disclosure; penalties.

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and * * *

Whoever willfully violates any of the provisions of this section or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by

a like fine, imprisonment, or both. As used in this section the term "person" means an individual, partnership, association, or corporation.

26 U.S.C. (1952 Ed., Supp. IV) 7213 provides:

Unauthorized disclosure of information.

(a) Income Returns.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

18 U.S.C. (1952 Ed.) 1905 provides:

Disclosure of confidential information generally.

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record

made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

31 C.F.R. (1949 Ed.) 54.25 provides:

Licenses. (a) Upon receipt of the application and after making such investigation of the case as it may deem advisable, the mint, if satisfied that gold is necessary for the legitimate and customary requirements of the applicant's industry, profession, art, or business, shall issue to the applicant a license on form TGL-12, TGL-13, or TGL-14, whichever is designated in rulings of the Secretary of the Treasury for the kind of business, industry, profession, or art in which the applicant is engaged.

* * * *

31 C.F.R. (1949 Ed.) 54.26 provides:

Records. Every person holding a license issued pursuant to § 54.23 shall keep exact records of all his acquisitions and deliveries of gold. His records shall contain the name, address, and license number of each person from whom he acquires, or to whom he delivers, gold (other than fabricated gold) and shall show the amount, date, and description of each such acquisition and delivery, and such records shall be available for examination by a representative of the Treasury Department for at least 1 year after

the date of the disposition of such gold. If the person from whom such gold is acquired, or to whom such gold is delivered, does not have a license such records shall show, in lieu of the license number of such person, the section of the regulations in this part pursuant to which such gold was held or acquired by such person.

31 C.F.R. (1949 Ed., 1956 Supp.) 54.26 provides:

Investigations; records; subpoenas. (a) The Director of the Mint is authorized to make or cause to be made such studies and investigations, to conduct such hearings, and to obtain such information as the Director deems necessary or proper to assist in the consideration of any applications for licenses, or in the administration and enforcement of the acts, the orders, and the regulations in this part.

(b) Every person holding a license issued under § 54.25 (a), or acquiring, holding or disposing of gold pursuant to the authorizations in § § 54.18 and 54.21, shall keep full and accurate records of all his operations and transactions with respect to gold, and such records shall be available for examination by a representative of the Treasury Department until the end of the fifth calendar year (or if such person's accounts are kept on a fiscal year basis, until the end of the fifth fiscal year) following such operations or transactions. The records required to be kept by this section shall include the name, address, and Treasury gold license number of each person from whom gold is acquired or to whom gold is delivered, and the amount, date, description and purchase or sales price of each such acquisition and delivery, and any other records or papers required to be kept by the terms of a Treasury Department gold license. If the person from whom gold is acquired, or to whom gold is delivered, does not have a Treasury gold license such records shall show, in lieu of the

license number of such person, the section of the regulations in this part pursuant to which such gold was held or acquired by such person. Such records shall also show all costs and expenses entering into the computation of the total domestic value of articles of fabricated or semi-processed gold as defined in § 54.4.

CODIFICATION: In paragraph (b) the first sentence was amended to read as set forth above, 20 F. R. 7330, Oct. 1, 1955; 20 F.R. 7795, Oct. 15, 1955.

(c) The Director of the Mint (or the officers and employees of the Bureau of the Mint specifically designated by the Director) or any department or agency charged with the enforcement of the acts, the orders, or the regulations in this part, may require any person to permit the inspection and copying of records and other documents and the inspection of inventories of gold and to furnish, under oath or affirmation or otherwise, complete information relative to any transaction referred to in the acts, the orders, or the regulations in this part involving gold or articles manufactured from gold. The records which may be required to be furnished shall include any records required to be kept by this section and, to the extent that the production of such information is necessary and appropriate to the enforcement of the provisions of the acts, the orders, and the regulations in this part, or licenses issued thereunder, any other records, documents, reports, books, accounts, invoices, sales lists, sales slips, orders, vouchers, contracts, receipts, bills of lading, correspondence, memoranda, papers and drafts, and copies thereof, either before or after the completion of the transaction to which such records refer.

(d) The Director of the Mint may administer oaths and affirmations and may, whenever necessary, require any person holding a license under § 54.25 or acquiring, holding or disposing of gold

pursuant to the authorizations of §§ 54.18 or 54.21, or any officer, director, or employee of such person, to appear and testify or to appear and produce any of the records specified in paragraph (c) of this section or both, at any designated place.

The Federal Rules of Criminal Procedure provide:

Rule 41 (e): *Motion for Return of Property and To Suppress Evidence.*

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Rule 52:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

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